

ONTARIO ATTORNEY GENERAL LAW LIBRARY



00057457

FURTHER READING ON THE OFFICE AND ROLE OF THE ATTORNEY GENERAL

MINISTRY OF THE
ATTORNEY GENERAL
LAW LIBRARY

KF
9640
F87

Further reading on the office and
role of the attorney general

00057457

KF
9640
F87

Further reading on the office and
role of the attorney general

111

MINISTRY OF THE
ATTORNEY GENERAL
LAW LIBRARY

TABLE OF CONTENTS

Tab

- 1 The Honourable R. Roy McMurtry, "The Office of the Attorney General", in D. Mendes da Costa ed., The Cambridge Lectures (Toronto, Butterworths, 1981) 1-7
- 2 J. L1. J. Edwards, "The Attorney General and the Charter of Rights", in R.J. Sharpe, ed., Charter Litigation (Toronto: Butterworths, 1987) 45-68
- 3 "The Role of the Attorney General and the Charter of Rights", The Honourable Ian Scott (1986-87), 29 Crim. L.Q. 187-199
- 4 "Law, Policy and the Role of the Attorney General: Constancy and Change in the 1980's", The Honourable Ian Scott, (Spring 1989) 39 U.T.L.J. 109-126
- 5 Law Reform Commission of Canada, Working Paper 62, "Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor", 1990
- 6 Royal Commission on the Donald Marshall, Jr., Prosecution, 1989, excerpt pages 223-237
- 7 Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions, The Honourable G. Arthur Martin, O.C., O.Ont., Q.C., LL.D. Chair, 1993, excerpt pages 25-49



Digitized by the Internet Archive
in 2018 with funding from
Ontario Council of University Libraries

https://archive.org/details/mag_00057457

INDEX

<u>Topic</u>	<u>Tab</u>	<u>Page</u>
History of the office	1	1-3
	5	1-8
Relationship with Cabinet and Premier in criminal prosecutions	3	189-192
	4	119-122
	6	223-226
Role in providing legal advice to government /Cabinet	3	192-196
	4	111-115
Constitutional advice to government Policy vs legal advice	2	50-53
	3	192-196
	4	111-115
	4	125-126
	5	10-11
Accountability to Legislature	2	45-47
	5	11-12
	5	8-14
Relationship with Crown Attorneys	5	15-17
	6	226-228
Relationship with the police	4	117-119
	5	28-32
	6	231-235
	7	35-41
Role in private prosecutions	5	17-22
Overview of the criminal justice system	7	25-49
Factors to consider in continuing a prosecution	6	228
	6	235-237
Special role of the Crown in criminal prosecutions	7	31-34
Guardian of the public interest	1	4-5
	2	53-54
	3	196-199

<u>Topic</u>	<u>Tab</u>	<u>Page</u>
The “unconstitutional” federal law	4	123-124
Role in Civil Litigation	3	196-199
	4	109-111
	4	115
	4	124-125
Role in law reform	1	6-7
	4	115-116
Reform of the Office of Attorney General in the prosecution function	5	33-59
	6	229-230
Judicial supervision of prerogative decisions of the Attorney General	2	57-68
	4	122-123
	5	22-28

The Cambridge Lectures

Selected Papers Based upon Lectures Delivered
at the Cambridge Conference of the Canadian
Institute for Advanced Legal Studies, 1979

Edited by
Derek Mendes da Costa, Q.C., S.J.D. (Harv.), LL.D. (Lond.),
Chairman, Ontario Law Reform Commission



BUTTERWORTHS
Toronto

1

The Office of The Attorney General

The Honourable R. Roy McMurtry, Q.C.

Today has been an auspicious, even a historic, day. We have inaugurated a unique, and to my mind, a very significant venture of co-operation between the legal communities in our two countries of England and Canada. It is hard to over-estimate the ongoing significance of this conference. It will give us all a greater sense of the current development, and future direction of the law. It will cause us to reflect on the similarities and differences between our two legal systems, and will strengthen our recognition of the common heritage of ordered justice under law which links our two nations.

The office of Attorney General is a unique example of the English genius for developing eminently practical and exportable institutions which are then patched and altered to meet new conditions and new countries. It is an office of great history, with many different facets. The Attorney General has unique responsibilities to the Crown, to the courts, to the legislative and executive branches of government.

I have had the privilege of serving as Ontario's Attorney General for almost four years now. Each day I face new tasks and challenges which cause me to reflect frequently on the role of an Attorney General, and upon the many duties and responsibilities which the law and custom of the constitution have devolved upon the office.

In England the office of Attorney General has over 600 years of historical development behind it. Initially back in the mid thirteenth century, the Attorney's role was to represent the sovereign's interest in any particular litigation, since the King obviously could not appear in his own courts. The name Attorney General was first given to the Crown's principal law officer in 1461 when he was called on to advise the House of Lords on legal matters. This responsibility to give legal advice to the legislature remains part of my role in Ontario even today.

In Canada, the office has existed since 1749. The office has, however, developed differently in our two countries since then. For example, in England the Attorney General does not usually sit in Cabinet, though he may frequently be asked to give advice to Cabinet or its committees on legal matters. But in Canada for over 125 years the Attorney General has been a political officer and a leading member of the Cabinet team. Indeed on three occasions in Ontario the office has been held simultaneously with the premiership. The Canadian view is that it is essential for the Attorney to be a member of Cabinet since he bears administrative responsibility for a department of government and has responsibilities for policy formation.

Because he supervises the machinery of justice, he must as a Minister of the Crown be responsible to the legislature. One of the essential characteristics of the Attorney General's office is its politically accountable nature. Accountable politically, but also aloof from partisan politics. As the Honourable J. C. McRuer reminded us in his Royal Commission Inquiry into Civil Rights, the Attorney General

... must of necessity occupy a different position politically from all other Ministers of the Crown. As a Queen's Attorney, he occupies an office with judicial attributes and in that office he is responsible to the Queen and not responsible to the government. He must decide when to prosecute and when to discontinue a prosecution. In making such decisions he is not under the jurisdiction of the Cabinet nor should such decisions be influenced by political considerations. They are decisions made as the Queen's Attorney, not as a member of the government of the day.

This was not always the case however. One hundred and fifty years ago the Attorney General was indeed one of the most unenviable figures in government. A book published in London in 1819 entitled "Criticisms of the Bar" commented as follows:

Of all offices in the gift of the Crown, that of Attorney-General is perhaps least to be coveted; for whether the Government be popular or unpopular, the person filling that place can scarcely avoid being the object of general dislike. . . . He is pretty sure to be charged with having ascended by the usual steps of political fawning and judicial servility and after all he is only to be considered as the servant of servant—the curse of the Israelites. . . . The most unpleasant consequence of all appears to be that the nation at large must look upon the Attorney-General as a sort of ministerial spy whose business it is to ferret out and prosecute all who either by their actions or writings are endeavouring to displace the personages to whom he is indebted for his situation, or who are attempting to promote any reform in the system they support.

The re-establishment of the integrity and reputation of the Attorney General's office came about only because of the maintenance of a punctilious independence from partisan politics in the execution of the unique quasi-judicial responsibilities of the Attorney General. The ideal has been well described by the American political columnist Joseph Kraft:

The ideal Attorney General is an upright man, learned in the law, and with the most delicate sense of fairness, who acts less as a player on the Government team than as an umpire exerting a legal check on arbitrary action of the executive.

Abraham Lincoln's Attorney General, Edward Bates had been a politician, a Congressman, even a Presidential Candidate, but he gave a classic definition of the proper role of the Attorney General:

The office I hold is not properly political, but strictly legal and it is my duty, above all other Ministers of State, to uphold the law and to resist all encroachments from whatever quarter, of mere will and power.

Thus while the Attorney General must remain aware of the political considerations that contribute to a thorough assessment of the public interest, he can never let partisan politics weigh as a factor in any of his quasi-judicial functions, particularly in relation to the conduct of criminal proceedings. Lord MacDermott put it well when he said:

The days are gone when a subservient Attorney could be told whom to lay by the heels or whom to spare. He must now maintain a complete independence in this difficult and sometimes delicate sphere, and if he fails to do so, the remedy lies in his dismissal or that of the Administration.

The cardinal principle of political independence does not mean, however, that the Attorney General must act as a sort of unworldly legal monk, acting from some remote cloister. The Attorney General must always take account of the public interest in his many decisions. I had to weigh many factors in deciding that it would not be in the public interest to lay criminal charges against the former Solicitor General of Canada, Mr. Francis Fox. The special circumstances of the Fox case, the difficulty of ever achieving a conviction, the fact that Fox had already undergone a great deal, and the likelihood that a minimal sanction would have been imposed on conviction, led me to the conclusion that no prosecution should be launched. I gave my views at length to the legislature and I think the position I took was not merely understood, but accepted without criticism. This is perhaps the most difficult and delicate part of the job, the decision in borderline cases whether to prosecute or not. Weight must be given to many factors. Yet I do think that the comparatively small amount of public criticism that surrounds such decisions is indirect testimony to the skill and judgment of those who must help me make them. It also signifies a basic public confidence in the administration of justice.

Recently events in England have combined to focus public attention on the role of the Attorney General. Two years ago, the House of Lords handed down their decision in the case of *Gouriet v. The Union of Post Office Workers*,¹ a case which is a landmark in the development of judicial thought about the responsibilities of an Attorney General. In *Gouriet*, a private citizen sought an injunction against a postal union because of its pro-

posed ban on the handling of mail to South Africa. The Attorney General had refused to consent to the action. The courts were faced with the important constitutional question of whether or not they can compel the Attorney General to give reasons for exercising his discretionary powers. Are the courts able to override the Attorney General's decision to consent to a relator action or not?

Lord Denning thought they could. In the fierce rhetoric for which he is so justly famed, he thought that the Attorney General's powers were a fundamental threat to the rule of law. Lord Denning granted an individual citizen, Mr. John Gouriet, an interim injunction and hinted that the maintenance of the British system of justice rested on the courts reserving to themselves the right to review the decisions of the law officers of the Crown.

Thus rebuked by Lord Denning and his colleagues, the Attorney General appealed to the Lords. Not having been in the courtroom I cannot guess whether the progress of *Gouriet's* case through the courts gives any support for the maxim attributed to Lord Asquith of Bishopstone that

A trial judge should be quick, courteous and wrong. That is not to say that the Court of Appeal should be slow, rude, and right, for that would be usurping the function of the House of Lords.

In any event the Lords reversed the Court of Appeal in a manner described by a former English Attorney General as magisterial, categorical and severe. They said, in a unanimous decision, that the private citizen cannot, under any circumstances, invoke the aid of the civil courts to prevent a threatened breach of the criminal law, other than to protect his personal rights. If the criminal law is actually breached, every citizen retains the residual constitutional right to bring a private prosecution against the offender. But the Attorney General is the only person recognized by the public law as being entitled to represent the public interest in a court of justice; the civil courts may declare public rights only at his insistence. Public rights are constitutionally vested in the Crown, and the Attorney General enforces them as chief law officer of the Crown.

The significance of this case for me is not that it confirmed at the highest level the responsibilities which the Attorney General bears, but rather that it focused public attention for a while on the pivotal nature of the office of the Attorney General, and his constitutional role as guardian of the public interest. The dramatic clash of views between the Court of Appeal and the House of Lords graphically illustrated the unique role of the Attorney General and the pivotal influence of the powers and restrictions that must constantly engage him in making decisions that lie at the very heart of the administration of justice. As Professor John Edwards has so eloquently put it, "the Attorney General must constantly walk the narrow tight rope between the adjacent fields of mainstream politics and independent non-partisan judgments".

The case reaffirms the unique quasi-judicial role of the Attorney General. It reminds all who hold the office, of Harold MacMillan's statement that the obligations of the Attorney General were first to the Crown, second to the House, and only then to the government.

That was not how it seemed to be to the disgruntled litigant, Mr. John Gouriet, who said after the case: "It now seems that the law is no longer above the Attorney General. Recollecting the powerful words of Thomas Fuller 300 years ago, 'Be you ever so high, the law is above you'; the Attorney General has now, by this judgment, been confirmed as being unanswerable to the courts and has taken upon himself a certain divinity."

I think that we are likely to see increasingly in the next few years, the courts return to the issues raised in the *Gouriet* case. The Attorney General obviously must have a primary responsibility for protecting the public interest but the question is more frequently being asked: should this role be an exclusive one? The general question then becomes: whether the Attorney General or the court is best equipped to make a decision about the public interest. Lord Shawcross, a former Attorney General wrote to *The Times* expressing "grave concern" at the implications of *Gouriet*.

The fact is that we have moved away from Dicey's age of reasoned democracy into the age of power. Responsibility to Parliament means in practice at the most responsibility to the party commanding the majority there, which is the party to which the Attorney General of the day must belong. One has only to remember the so-called Shrewsbury "martyrs" and the Clay Cross affair to realize that that party will obviously not criticize the Attorney General of the day for not taking action which, if taken, might cause embarrassment to their political supporters. . . .

It is naive to observe, as was done in the *Gouriet* case, that the Attorney General may have regard to political considerations but "not of course acting for party political reasons". It is "of course" exactly the present appearance and the future possibility that he might so act which endangers both existing respect for and the future effectiveness of the rule of law, already sadly eroded in many fields.

In Canada, both the Ontario and British Columbia Law Reform Commissions, are currently embarked on research studies with a view to reforming the law of standing. A number of groups claiming to represent the public interest in environmental or other areas, have claimed that our law is far too restrictive in denying access to the courts to protect public rights except through the intervention of the Attorney General. Serious constitutional questions on standing are increasingly being raised in the courts. I am sure they will be discussed at length by the two law reform commissions, and I look forward keenly to reading their reports.

The office of Attorney General is steeped in history and tradition. That history, those traditions, are not merely of academic or scholarly interest. The traditions of the office of Attorney General boil down in their essence

to a set of very clear and very high standards of independence and objectivity, against which every holder of the office, whether in England or elsewhere in the Commonwealth, must daily measure his conduct in the matters which come before him for decision. The politically nonpartisan nature of the legal decisions the Attorney General must make, and the strong tradition of legislative accountability of the office, constitute one of the most important bulwarks of the rule of law.

Far from representing the dead hand of historical precedent, the traditions of the office of Attorney General represent a living standard of conduct which constantly and urgently commands the attention of everyone who is privileged to fill that office.

The office can be a demanding and, at times, a lonely one. Many of the Attorney General's tasks simply cannot be delegated, since the accountability for the decisions rests personally on his shoulders. One of the most famous English Attorneys, Francis Bacon once said that the office of Attorney General was "the painfulest task in the realm". It fell to another Attorney General, Sir Patrick Hastings, a few centuries later to say that being an Attorney General was his view of hell. Sir Patrick graphically described his misery in his Autobiography:

My day began at seven o'clock in the morning and I rarely got to bed before five the next morning. The day was spent in one long rush between the Law Courts, Government departments, and the House of Commons. The night, or rather the early morning was needed in order to get ready for the next day. Nothing that I began was I ever allowed to finish; and nothing was ever finished until something else was begun. Being an Attorney-General as it was in those days is my idea of hell. The only person who enjoyed my exalted position was my chauffeur. As I was in possession of a Cabinet pass I was authorized to drive through the streets without any regard to ordinary police regulations. He invariably elected to cross Trafalgar Square on the wrong side.

I was unpopular with everyone; the policemen in the House of Commons came to me in a body to protest against being kept up so late. I had no idea that because I stayed there all night they were obliged to stay there too. Although I lived only a mile away it was too far, and I was obliged to take rooms in Queen Anne's Mansions in order to have time for any sleep at all. Life was made no easier by bright young Conservatives who devised a pleasant scheme whereby to cause additional annoyance; they made a habit of complaining that the Government were discourteous to the House by not having one of the law officers present during the debates in order to answer wholly unnecessary legal queries. As they knew that I was the only law officer available, and that I was probably far away, their jibe was much appreciated. Anyhow, they made my life unbearable. By the end of the summer I had enjoyed about as much as I could stand.

There are times when I wholeheartedly sympathize with Sir Patrick Hastings' experience.

Attorneys General are above all servants of the law, responsible for protecting and enhancing the fair and impartial administration of justice, for safeguarding civil rights and maintaining the rule of law. One of the central responsibilities of the office today, as I see it, is to ensure that the law is kept in step with contemporary needs and conditions. Law reform has been one of my major concerns since taking office in 1975. Although it has required an exceptional amount of time in policy-making, in Cabinet, and the House, I am proud to have introduced 63 separate bills in the last four years. I think that major measures such as family law reform, succession law reform and reform of our provincial offences procedure will be of incalculable benefit to the public whom we serve.

Law Reform is a time-consuming and absorbing task. The principles of reform can only become a concrete reality when they have undergone a lengthy process of detailed and searching examination in the legislature. In this process of painstaking attention to detail, absorbing though it may be, one can never lose sight of the central goals of law reform in the classic sense that was expressed so many years ago by Lord Brougham in his famous speech:

It was the boast of Augustus . . . that he found Rome of brick, and left it of marble; a praise not unworthy of a great prince, and to which the present reign also has its claims. But how much nobler will be the Sovereign's boast, when he shall have it to say, that he found law dear, and left it cheap; found it a sealed book—left it a living letter; found it the patrimony of the rich—left it the inheritance of the poor; found it the two-edged sword of craft and oppression—left it the staff of honesty and the shield of innocence.

I can think of no better precept with which to leave these thoughts on the Office of Attorney General. Lord Brougham's rubric quite properly emphasizes the paramount importance of the administration of justice serving every member of the public. Those of us who are privileged to serve in this office cannot help but be humbled by the sense of historical tradition and duty which has from the earliest day infused the work of the Attorney General.

The office of Attorney General is central to our system of justice, as it is in England, Australia, the United States and all other common law countries. It is sustained by the great traditions shared by our profession, of commitment to ordered liberty under law, to freedom, justice and the rule of law.

NOTES

1. [1978] A.C. 435 (H.L.); revg. [1977] Q.B. 729 (C.A.).

Charter Litigation

Edited by

Robert J. Sharpe
B.A., LL.B., D.Phil

Of the Ontario Bar
Professor and Director, Constitutional Litigation
Programme
Faculty of Law
University of Toronto

Butterworths

Toronto and Vancouver

THE ATTORNEY GENERAL AND THE CHARTER OF RIGHTS

J. Ll. J. Edwards*

Whatever views may have been entertained as to the restricted ambit of section 7 of the Charter of Rights, as expressed by the Attorney General of Canada and his senior officials when piloting the measure through Parliament,¹ we now have to face the realities of the constitutional initiatives asserted by the Supreme Court in the *B.C. Motor Vehicle Act* case.² According to the leading judgment delivered by Lamer J., and assented to by all but one of the other members of the court, "the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system."³ Conformity with procedural principles of fundamental justice is no longer the only standard when considering a challenge based on section 7. Henceforth, provisions and principles of the substantive law are also subject to constitutional examination by the courts.⁴ This

*Professor Emeritus, Faculty of Law and the Centre of Criminology, University of Toronto.

¹See the *Proceedings of the Senate Joint Committee on the Constitution of Canada*, 32nd Parl., 1st Sess. Issue no. 46, January 27, 1981, cols. 30-33, 35-39, 40-43, for the opinions expressed by Mr. Chretien, in his capacity as Minister of Justice & Attorney General of Canada, and Mr. B.L. Strayer, Assistant Deputy Minister, Public Law, Justice Department. Following his appointment to the Federal Court, Trial Division, Strayer J. adhered to the view he had expressed to the Senate Joint Committee, viz., that s. 7 of the Charter was designed to cover procedural not substantive principles of fundamental justice: see *Latham v. Solicitor General of Can. et al.* (1984), 39 C.R. (3d) 78 (Fed. T.D.). The Manitoba C.A. took the same position in *R. v. Hayden* (1983), 3 D.L.R. (4th) 361, at 363-4 (Man. C.A.), but the more expansive interpretation of s. 7 was clearly preferred by the Ontario C.A. in *R. v. Young* (1984), 46 O.R. (2d) 520, at 542 (C.A.); *R. v. Roche* (1985), 46 C.R. (3d) 160, at 170 (Ont. C.A.); and *R. v. Morgentaler* (1985), 52 O.R. (2d) 353, at 385-6 (C.A.). It was the B.C.C.A.'s decision in the *Motor Vehicle Act Reference* case (1983), 147 D.L.R. (3d) 537 (B.C.C.A.), that was upheld by the S.C.C., [1985] 2 S.C.R. 486, thus substantially departing from the drafters' original conception of what s. 7 of the Charter was intended to accomplish.

²*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.

³*Ibid.*, at 512.

⁴Experience may well demonstrate the irreconcilable nature of the distinction drawn by Lamer J. when he stated: "The task of the Court is not to choose between substantive or procedural content *per se* but to secure for persons 'the full benefit of the Charter's protection' ... under s. 7, while avoiding adjudication of the merits of public policy" *Ibid.*, at 499.

interpretation of section 7 of the Charter has confirmed what has already become obvious to any student of the constitutional scene in Canada. In the words again of the Supreme Court: "even at this early stage in the life of the Charter, a host of issues and questions have been raised which were largely unforeseen"⁵ at the time of the parliamentary debates leading up to the entrenchment of the Charter.

A. NEED TO REASSESS THE CONSTITUTIONAL POSITION OF THE ATTORNEY GENERAL'S OFFICE IN CANADA

In this unfolding agenda, created by the Charter of Rights, there is a vital need to reassess the role of the office of Attorney General in this country. The present symposium provides an opportunity, I hope, to instil a greater awareness of the unique character of this historic office. It may be that "reassess" is too strong a word to describe an exercise that has scarcely begun and which, if it has ever existed in Canada, has generally succeeded in obscuring most of the usual signs of active debate on the subject. Occasionally, it is true, pronouncements are made by the courts at all levels categorically rejecting jurisdiction to review such decisions as the preferring of indictments or the staying of proceedings made by the Attorney General in his capacity as the Crown's chief prosecutor.⁶ This unwillingness to encroach on the traditional domain of the Attorney General, as the member of the executive branch responsible for the administration of justice, is usually accompanied by reminders from the bench of the constitutional principle that the accountability of the Attorney General, within his sphere of authority, is to be discharged on the floor of the legislature or in the Parliament of Canada, as the case may be.⁷

⁵*Ibid.*, at 509.

⁶The leading decision which recognizes this principle is *Smythe v. The Queen*, [1971] S.C.R. 680, affirming the constitutional analysis contained in the judgment of Wells C.J.H.C. in [1971] 2 O.R. 209 (C.A.). Other important cases that subscribe to the same view of the Attorney General's position include *R. v. Court of Sessions of the Peace et al., ex p. Lafleur*, [1967] 3 C.C.C. 244 (Que. C.A.); *Re Balderstone and The Queen* (1983), 4 D.L.R. (4th) 162 (Man. C.A.); and *Re Saikaly and The Queen* (1979), 48 C.C.C. (2d) 192 (Ont. C.A.). The nub of the problem is captured in the *Balderstone* decision where Monnin C.J.M. declared (*ibid.*, at 169): "The judicial and the executive must not mix. These are two separate and distinct functions. The accusatorial officers lay informations or in some cases prefer indictments. Courts or the curia listen to cases brought to their attention and decide them on their merits or on meritorious preliminary matters. If a judge should attempt to review the actions or conduct of the Attorney-General — barring flagrant impropriety — he could be falling into a field which is not his interfering with the administrative and accusatorial function of the Attorney-General or his officers. That a judge must not do."

⁷See, e.g., in Canada, *Re Dowson and The Queen* (1981), 62 C.C.C. (2d) 286, at 286 (Ont. C.A.); *revd* [1983] 2 S.C.R. 144, *per* Howland C.J.O.; *Re Balderstone* (1983), 4 D.L.R. (4th) 162, at 169 (Man. C.A.), *per* Monnin C.J.M.; and, in England, *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435, at 512 and 524 (H.L.).

Looked at in realistic terms, there is no denying the fact that the practical exigencies of a crowded legislative timetable, and even more so the ineffectual questioning of the principal Law Officer of the Crown, have contributed to diminishing confidence in the argument that the proper place to subject the Attorney General to a full accounting for departmental actions is the legislative assembly. An examination of the proceedings in Parliament and the provincial legislatures during the past quarter of a century will quickly confirm that such occasions of public accountability have been singularly sparse in number. It is possible to enumerate with no difficulty at all the few instances in which a full scale attempt has been made to define for the assembled legislators the nature of the office of the Attorney General and the responsibilities of this important portfolio.⁸ Furthermore, if the matter is viewed from the perspective of a person who feels that he has been wronged by the actions of the Attorney General, the inadequacies of the legislative assembly as a tribunal for remedying a particular injustice become more than ever apparent.

Despite all these deficiencies, as I have more fully argued elsewhere,⁹ I am not persuaded that we should cast aside the potential strengths inherent in the system of parliamentary accountability with its ultimate sanction of enforcing the resignation or dismissal of the responsible Attorney General. With every likelihood of a growing range of Charter challenges to governmental policies being launched in the courts we should not overlook the fact that if minded to do so, the legislature can effectuate statutory changes or rectify unacceptable modes of executive action. An imaginative and politically sensitive Attorney General can be counted upon to show a marked awareness of the alternative options at his disposal in meeting confrontations clothed in the language of the Charter of Rights.

Until very recently, the appearance of an Attorney General in person to argue a constitutional (or any other) case was calculated to reveal the incumbent's lack of forensic skills and experience. As most lawyers are aware, this situation is in marked contrast to that which prevails in Britain where each of the Law Officers — the Attorney General and

⁸See, e.g., the statement by the Attorney General of Canada (Mr. Ron Basford) in connection with the prosecution of the *Toronto Sun* under the *Official Secrets Act*, H.C. Debates, Vol. 121, pp. 3881-3883, March 17, 1978 and that of the Attorney General of Ontario (Mr. Roy McMurtry) in announcing his decision not to prosecute Mr. Francis Fox, a member of the Federal Cabinet, Ontario Legislative Debates, December 23, 1978.

⁹See Edwards, *The Attorney General, Politics and the Public Interest* (1984) (hereafter *The Attorney General*), pp. 129-137; Edwards, *The Law Officers of the Crown* (1964) (hereafter *The Law Officers*), Chs. 10 and 11; and Edwards, *Ministerial Responsibility for National Security as it relates to the Offices of Prime Minister, Attorney General and Solicitor General of Canada* (1980) (hereafter *Ministerial Responsibility*), Chs. 11 and 12.

the Solicitor General, as well as the Lord Advocate in Scotland — is likely to have achieved some eminence as counsel prior to his or her political appointment. I for one, however, welcome the reversal of past experience in Canada with the appointment of counsel of the first rank, in the person of Mr. Ian Scott, to the position of Attorney General of Ontario. This event augurs well for enhancement of this historic office. If any of Mr. Scott's ministerial counterparts in other parts of the country is minded to assert his pre-eminent right of audience in the courts I hope that the cases selected will at least reflect the importance of the issues before the court.

It may be worth noting here that there exists a long established convention in England and Wales that the Attorney General should lead in Crown cases involving major constitutional considerations and in criminal prosecutions for treason.¹⁰ The same observation would appear to extend to important trials under the *Official Secrets Act*. Given the notable differences that have come to be accepted in Canada as to the Attorney General's non-appearances as leading counsel it would be inappropriate to draw invidious comparisons with the traditions associated with the Law Officers in Britain. But, as I shall endeavour to argue later in this paper, a strong case can be developed favouring the personal intervention of the Attorney General in cases that involve major questions of constitutional importance under the Charter of Rights.

In the past, if constitutional questions reached the point of litigation it was customary to find counsel representing the Attorney General of Canada squaring off against a bevy of other counsel representing those provinces which had a major stake in the outcome of the litigation. Occasionally, the federal Department of Justice might enjoy the unaccustomed support of one or two provinces in arguing for a particular interpretation of a contentious statutory provision. This was never the case, however, on the burning issue of constitutional authority to prosecute. On the crucial question of drawing the boundary lines demarcating the scope of provincial power under the administration of justice head of power (s. 92(14)) and its relation to the federal authority under the criminal law power (s. 91(27)), the federal and provincial positions remain implacably divided. This was not always so, at least if reference is had to ministerial statements on the subject in the Parliament of Canada by former federal Attorneys General.¹¹ The policy decision to assert, originally in exceptional situations and later expanded to normal circumstances, the Government of Canada's exclusive authority to prosecute, including offences under the Criminal Code, is of comparatively recent

¹⁰See Edwards, *The Law Officers*, pp. 306-308.

¹¹A selection of such pronouncements is contained in Edwards, *Ministerial Responsibility*, pp. 14-15.

origin. This constitutional stance has now been strengthened by a group of unfortunate decisions by the Supreme Court of Canada in the *Hauser*,¹² *Wetmore*¹³ and *C.N. Transportation*¹⁴ cases that reflect an exaggerated adherence to the *ipsissima verba* of the language used in the B.N.A. Act, coupled with insufficient weight being accorded to the constitutional history of prosecuting responsibilities prior to Confederation.¹⁵ The efflux of time and the changing composition of the highest court may yet bring about a shift in that court's delineation of constitutional jurisdiction with respect to prosecuting decisions that fall within the ambit of the Criminal Code.

What of the future? Contentious issues regarding the interpretation of the B.N.A. Act, now the *Constitution Act 1867*, will continue to engage the attention of the Law Officers of the Crown at each level of government but, as we have been forcefully reminded by the present Chief Justice of Canada and his judicial colleagues, a vital shift in approach is called for when applying that part of the Canadian Constitution that is now entrenched in the "Supreme Law" of the land, the Charter of Rights and Freedoms. In an address on "The Public Responsibilities of Lawyers" to the Manitoba lawyers in 1983 Dickson C.J. warned:¹⁶

We must exercise reasonable sense, restraint and self-control but the constitutionally protected rights and freedoms must not be cut down by any narrow or technical construction. The *Charter* is capable of growth expansion within its constitutional limits. There is room for interpreting it *sui generis* with less rigidity and more generosity than other acts of parliament or legislatures. It must be treated as a constitutional instrument enjoying a special status and calling for principles of interpretation of its own.

In the same address the Chief Justice declared:

The entrenchment of fundamental rights and freedoms means that these values are higher, more sacred, than other public interests¹⁷. . . .

[T]he Charter has replaced parliamentary supremacy with constitutional supremacy. A limit has been placed upon absolute executive and legislative powers. Public authority has been bridled by constitutional guarantee. A new dimension has been added to the responsibility of Canadian lawyers¹⁸. . . .

[I]t is presumably easier and cheaper to look to the courts for social changes than to go through the laborious and time-consuming process of persuading leg-

¹²*R. v. Hauser et al.*, [1979] 1 S.C.R. 984.

¹³*R. v. Wetmore and A.G. Ont. et al.*, [1983] 2 S.C.R. 284.

¹⁴*A.G. Can. v. C.N. Tpt. Ltd.*, [1983] 2 S.C.R. 206.

¹⁵An indication of my concerns regarding this contentious issue was expressed shortly after the S.C.C. handed down its decision in *R v. Hauser* [1979] 1 S.C.R. 984: see *Ministerial Responsibility*, pp. 11-14.

¹⁶(1983), 13 Man. L.J. 175, at 186.

¹⁷*Ibid.*, at 185.

¹⁸*Ibid.*, at 184.

islators. Litigation is being substituted for politics; the judicial process for the political process.¹⁹

These are stirring sentiments but perhaps, in some places, they exaggerate the future implications for the courts and legislatures of this country. If indeed a new dimension has been carved out of the traditional responsibilities of lawyers, and these are usually cast in terms of the adversary system, what of the responsibilities of the Attorney General as the oft-proclaimed "guardian and protector of the public interest?"²⁰ According to the Chief Justice Dickson's interpretation of the Charter, entrenchment of the fundamental rights and freedoms means that "these values are higher, more sacred, than other public interests." What guidance can the courts expect from that avowed champion of the public interest, the Attorney General, whose identification with these responsibilities has a long constitutional history recognized by the courts and is challenged only where a divergence of views becomes manifest as to what constitutes "the public interest" in particular situations.²¹ Section 1 of the Charter, making the enumerated rights and freedoms subject to such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society," is in some ways the most important provision in the entire instrument. The final determination of how far these limits are to be applied rests with the judiciary, but where the legislation or executive action is challenged as violating Charter guarantees, the courts can look forward to well developed arguments being advanced by the Law Officers of the Crown as to where the reasonable limits should be drawn.

B. INDEPENDENCE AND PARAMOUNTCY OF THE ATTORNEY GENERAL AS THE GOVERNMENT'S CHIEF LEGAL ADVISER

It is important to determine the precise character of the duty cast upon the Attorney General in seeking to uphold a particular interpretation of the existing law or the constitutionality of substantive principles of law that now appears to be open to challenge under the expansive

¹⁹*Ibid.*, at 187. The Chief Justice of Canada has developed the themes captured in the above extracts in addresses delivered to the mid-winter meeting of the C.B.A. (Feb. 2, 1985), to the U. of Ottawa Conference on the Supreme Court of Canada (Oct. 4, 1985) and to the Osgoode Hall Law School, York University Convocation (June 21, 1985).

²⁰The evolution of this title, its association with the Law Officers of the Crown and the scope of the responsibilities associated with it are described in Edwards, *The Law Officers*, pp. 286-308 and *The Attorney General*, pp. 138-176.

²¹Among the instances where a possible divergence of view may arise in interpreting where the public interest should lie are occasions when the A.G. appears as an "amicus curiae" or "intervener" to protect or enforce public rights: see Edwards, *The Attorney General*, pp. 153-158, and where the A.G. moves *ex officio* in relation to contempt of court proceedings: see *ibid.*, pp. 167-171.

approach to section 7 of the Charter reflected in the Supreme Court's decision in the *B.C. Motor Vehicle Act Reference* case.²² Is the Attorney General to be seen as acting in his capacity as the government's chief lawyer, as the government's chief legal adviser, or as the Law Officer representing the Crown as the "fountain of justice" in the sense of its symbolic representation of a much larger constituency, the citizenry at large? I propose to examine this question initially in the context of executive action by Ministers and their staffs when faced with legal and policy alternatives that are overshadowed by the omnipotent Charter of Rights. In some jurisdictions, there is reason to believe that departmental policies are governed by the legal advice tendered by the department's own in-house lawyers or that of private counsel whose opinion has been sought and is looked upon as supportive of the position adopted by the pertinent Minister. This may not create any particular difficulties in most situations but let us assume that a conflict of opinion arises by virtue of the Attorney General's assessment of the legal and policy issues, either in the exercise of his personal judgment or on the basis of recommendations put forward by the senior lawyers in the Attorney General's department. There appears to be considerable confusion as to whose interpretation of the law, whose assessment of the policy implications of the legal conflict should prevail. Furthermore, with every likelihood of major disputes arising in the interpretation of such pervasive provisions as s. 2 (the fundamental freedoms section) and s. 15 (the equal rights section) of the Charter, clarification of the constitutional position is long overdue.

It is important to note at the outset that the existence of the Charter *per se* has in no way altered the constitutional position. To obtain a true understanding of the status of the Attorney General's office in Canadian constitutional law it is necessary first to recall the terms of the original Act of 1868 respecting the Department of Justice.²³ With some modifications, that are of no consequence to the present discussion, the constitutional responsibilities of the Minister of Justice and Attorney General of Canada remain the same today. Most of the provinces have followed the same language in defining the functions and duties of the first Law Officer of the Crown in their respective jurisdictions.²⁴ For the sake of convenience I propose to refer to the Ontario statute²⁵ but no significant differences will be found in any of the other provincial enactments. Foremost, for our present purposes, is the recognition

²²*Supra*, note 2.

²³The text of the pertinent sections 2 and 3 of the *Department of Justice Act*, 31 Vict. c. 39, together with some of the historical background, is given in Edwards, *Ministerial Responsibility*, pp. 6-9.

²⁴See *ibid.*, pp. 11-19.

²⁵*Ibid.*, pp. 18-19.

the Attorney General as "the Law Officer of the Executive Council",²⁶ who "shall advise the Government upon all matters of law connected with legislative enactments and upon all matters of law referred to him by the Government";²⁷ "shall advise the Government upon all matters of a legislative nature and superintend all Government measures of a legislative nature";²⁸ and "shall advise the heads of the ministries and agencies of Government upon all matters of law connected with such ministries and agencies."²⁹ If this language lacks an assertion of the paramountcy of the Attorney General's advice when given either to the executive council or its members and their individual departments, it is my opinion that the unquestioned supremacy of the Attorney General in all matters concerning legal advice to the Government and its several parts derives from the residual provision which states that the holder of that office "shall perform the duties and have the powers that belong to the Attorney General and Solicitor General of England by law or usage, so far as those duties and powers are applicable to Ontario...."³⁰

There is not the space at my disposal to argue fully the case in support of the constitutional positions of paramountcy and independence claimed for the Attorney General when discharging his role as the chief legal advisor to the Crown and to the government in all its parts. I have undertaken this task in my book on *The Attorney General, Politics and the Public Interest*³¹ to which the reader is encouraged to refer. Where the issues are strictly matters of law, such as statutory interpretation or the application of rules of substantive law and procedure, few serious problems can arise. Where, however, legal and policy issues are intertwined the subject assumes much larger proportions, especially if the record reveals an unqualified commitment to the Ministry's position by the officials in that department's legal branch. If the policies in question involve the application of one or other of the legal rights set forth in the Charter, as to which the opinion of the Ministry and its legal branch is diametrically opposed to that entertained by the Attorney General, the first Law Officer may choose to defer to the policy position taken by the other branch of the Executive. If so, this will be by choice and not through any constitutional obligation to confine himself to expressing a legal opinion in the narrowest sense of that expression.

The Attorney General is entitled to oppose the policy of his ministerial colleagues at every stage of its formulation and implementation.

²⁶Ministry of the Attorney General Act, R.S.O. 1980, c. 271, s. 5(a).

²⁷*Ibid.*, s. 5(e).

²⁸*Ibid.*, s. 5(f).

²⁹*Ibid.*, s. 5(g).

³⁰*Ibid.*, s. 5(d).

³¹Edwards, *The Attorney General*, pp. 177-197.

including discussions within the appropriate cabinet committee or in the cabinet itself. If the full weight of the Attorney General's office is to be sustained it must be seen that the so-called policy imperatives derive from the legal implications of the proposed policy. Nowhere is this likely to be more apparent than if the proposed legislative or executive action is calculated to invite a major Charter challenge. For the government to reject the Attorney General's advice would be quite exceptional and, in my view, should lead the Attorney General to question seriously his commitment to serve the Government as its chief legal adviser. This threat should not be lightly undertaken but if the claim to the title of "guardian of the public interest" is to be reinforced it must be shown that the Attorney General is totally committed to upholding the "Supreme Law" as the embodiment of society's deepest convictions.

C. CONSTITUTIONAL DUTY OF THE ATTORNEY GENERAL TO ACT AS GUARDIAN OF THE PUBLIC INTEREST

Should the application of the Charter be less than clear, wherein lies the further responsibility of the Attorney General? If he views his functions as restricted to that of ensuring that the government is represented by counsel in the ensuing litigation, thereby acting in strict accordance with his statutory duty to "conduct and regulate all litigation for and against the Crown or any ministry or agency of Government in respect of any subject within the authority or jurisdiction of the Legislature",³² it is my opinion that the Attorney General would be in serious dereliction of his larger constitutional duty to ensure that the wider public interest is adequately represented. It is not enough to assume that a public spirited citizen or interest group will step forward to assert a Charter challenge. Merely ensuring that the necessary funding is forthcoming to maintain such a suit, including the costs of providing legal counsel to represent the citizens' claims, is not sufficient. These alternatives may be sufficient to meet most of the claims deserving support and recognition. The door, however, must be left open, in my judgment, for the extraordinary demonstration of the Attorney General's independent status and independent responsibilities by way of active representation in the courts, in his own person if that is necessary, to argue the case on behalf of the public interest.^{32a}

³²Ministry of the Attorney General Act, R.S.O. 1980, c. 271, s. 5(h).

^{32a}For an early illustration of the appearance in the same case by the Attorney General, in his role as *parens patriae* representing the public interest and the Solicitor General, representing the private interests of the Crown, a procedure that was approved by Sir John Romilly M.R., see *A.G. v. Dean and Canons of Windsor et al.* (1858), 24 Beav. 679 at 691, 694.

Steps to ensure that the government's more restricted interests are adequately represented can readily be accomplished through senior departmental counsel. It could be argued that the objective described above could just as readily be discharged by engaging the services of independent counsel, drawn from the ranks of the private Bar. This suggestion is deserving of implementation in appropriate circumstances. My concern, however, is not merely to observe the minimum dictates of adequate representation on behalf of the maligned citizen, or a specially disadvantaged or threatened group in society, but to underline the significance that attaches to the unique constitutional place occupied by the office of the Attorney General in Canada and in so doing to strengthen in the public mind an awareness of the Attorney General's determination to uphold the essential qualities of this historic office. Added force to these arguments is provided by the specific inclusion in the federal *Department of Justice Act*, and in each of the provincial statutes that describe the functions of the Attorney General, of the requirement that the Attorney General "shall see that the administration of public affairs is in accordance with the law".³³ That exhortation, I suggest, is given renewed vigor in the light of the Charter's declaration that its manifold provisions represent "the supreme law of Canada" subject, of course, to the tantalizing problems that are embedded in section 32 defining the constitutional scope of the Charter.

D. SOME COMPARATIVE LESSONS FROM THE UNITED STATES EXPERIENCE

I would not at all be surprised to hear criticisms of my exposition of the philosophy towards Charter questions that should permeate the thinking and actions of those who assume the office of Attorney General. Such criticisms might be expected to dwell on the predominantly political role associated with the office in Canadian history, it being an accepted fact that at least since Confederation the portfolio of Attorney General has been amongst the more senior appointments in the executive council, or what we now popularly refer to as the cabinet. In this respect the office is much closer to the United States tradition than the experience of the Attorney General in the United Kingdom which office, for the past 60 years, has always remained outside the cabinet.³⁴ Nevertheless, it is interesting to note that, following the Watergate affair, there have been serious attempts to develop a strictly non-partisan approach to the lawyering functions of the United States Department of Justice. In 1980 a remarkably frank and revealing examination of these issues was under-

³³R.S.C. 1970, c.J-2, s. 4(b) and R.S.O. 1980, c. 271, s. 5 (b).

³⁴See Edwards, *The Law Officers*, ch. 9 and *The Attorney General*, ch. 3.

taken in a conference that bore the title "The President, the Attorney General and the Department of Justice."³⁵ Participating in that event were a number of recent holders of the offices of Attorney General and Solicitor General of the United States, former Counsel to the President, and former heads of the principal divisions of the Justice Department. One former Attorney General maintained that the Justice Department should be a "neutral zone",³⁶ and others referred to the "deeply held belief among Justice Department lawyers that their allegiance is to the law and that they should behave as detached professionals, unswayed by what are loosely and invidiously referred to as political considerations."³⁷ At the same time it was acknowledged that the policies of the current administration had to be taken into account. As the writer of the principal discussion paper for the Conference, Professor Daniel J. Meador, pointed out:³⁸ "An appropriate accommodation of these tensions is a central mission of the Attorney General. [A]s the link between the White House and the government's legal forces, the Attorney General must assure adherence to law while at the same time implementing Administration policies insofar as those policies are not contrary to law and do not work unfairness in the administration of justice." This assessment might equally be said to describe the continuous conflict of purposes that face the holder of the same office in every jurisdiction of Canada.

Before leaving this brief comparative glance at our neighbours to the south it might be useful to take a closer look at the position of

³⁵A fuller discussion of the issues covered in this Conference, held in the University of Virginia, January 4-5, 1980, is contained in *The Attorney General*, pp. 58-61, 190-192. The Conference proceedings, including the major paper by Professor Daniel J. Meador, were published by the White Burkett Miller Center of Public Affairs, University of Virginia, under the title, *The President, The Attorney General and the Department of Justice* (1980).

³⁶Address by the Hon. Griffin B. Bell, Attorney General of the U.S., before Department of Justice Lawyers (Sept. 6, 1978), cited in Conference Proceedings, *ibid.*, p. 33.

³⁷Conference Proceedings, *ibid.*

³⁸*Ibid.*, p. 34. Archibald Cox, a former U.S. Solicitor General and Special Prosecutor in the Watergate affair, has expressed his view of the S.G.'s office even more forcefully stating:

... the Solicitor General of the United States enjoys more independence than any other lawyer in government, indeed more independence than any other official. He enjoys it, and his clients, government agencies and officials defer to him, only because of the tradition established long ago by the candor of Solicitors General Mitchell and Thatcher in presenting cases to the Supreme Court, by confessions of error when it would be stultifying to defend the government's position, and by the person refusal on rare occasions to argue a case or even to sign the government's brief when the 'client', the President or Attorney General, dictated a position that the Solicitor General concluded he could not advocate without violating his duty to conscience and the law. [(1984), 10 Barrister at 55-56].

the United States Solicitor General. According to Professor Meador, the office of Solicitor General is amongst the most prestigious in the entire legal profession.³⁹ The Solicitor General and his staff represent the United States in the Supreme Court and, in addition, decide whether the United States should file a brief as *amicus curiae* in any appellate court. Professor Meador mentions the curious fact that the Solicitor General's office enjoys an immunity from suspicions of "political control" and "political pressures" that is nowhere matched by other government lawyers.⁴⁰ At the same time, there is no denying the fact that the Solicitor General's arguments for a particular legal position may have profound bearing on the administration's social or economic policies. It is impossible to totally isolate the one set of considerations from the other but there can be very different outcomes according to which set of variables dominates the Solicitor General's approach to the litigation. The traditions of the office, and the professional quality of the lawyers holding the office, sustain expectations of a commitment to independence of judgment and to steering a course that is captured by the inscription on the wall just outside the Attorney General's office in Washington which reads: "The United States wins its point whenever justice is done one of its citizens in the courts."⁴¹

E. THE CASE FOR RECONSTITUTING THE OFFICE OF SOLICITOR GENERAL AS A NON-POLITICAL APPOINTMENT

In the mid-1960's I argued publicly for the reorganization of the Departments of Justice at both levels of government in Canada and for the creation of a public service appointment of Solicitor General as the deputy to the Attorney General and responsible to the senior Law Officer for representing the Crown in all civil and criminal proceedings.⁴² Had these pleas been realized, the office of Solicitor General would have been in place to meet some of the needs that I see associated with the advent of the Charter of Rights and Freedoms as part of our constitution. As is well known, action was taken in 1966 by the Government of Canada, and later confirmed by Parliament, to separate the policing and law enforcement functions of the Department of Justice from the litigation and other lawyering responsibilities associated with the office of the Attor-

³⁹*Ibid.*

⁴⁰*Ibid.*, p. 35.

⁴¹*Ibid.*, p. 34.

⁴²In a public lecture entitled "Penal Reform and the Machinery of Criminal Justice in Canada", subsequently published in (1966), 8 Cr. L.Q. 408, at 424-426. This is the constitutional position reflected in Australia (both federally and in the States) and in New Zealand.

ney General of Canada.⁴³ Reorganization of a similar nature was later to sweep the legislative corridors of Ontario and Alberta, in the course of which the title of Solicitor General was misguidedly conferred upon the newly created departments of government responsible for policing, law enforcement and corrections.⁴⁴ This retrograde step has succeeded in distorting beyond recognition the historical foundations of the office of Solicitor General which date back to the 15th century in England.

Apart from the Canadian aberrations to which I have just referred, I know of no other instances within the English speaking world in which the Solicitor General's office has been dissociated from its principal function of being the second Law Officer of the Crown, and deputy to the Attorney General.⁴⁵ If the goal of de-politicizing the office of Attorney General in Canada is viewed as unattainable, there is all the more reason for restoring the office of Solicitor General to its former status and replacing the title of the present departments with a description such as the "Minister for Internal Affairs" or "Minister of Justice" which would more accurately reflect the scope of the responsibilities associated with that department at both levels of government. To avoid any possible ambiguity, I see the argument for the establishment of the Solicitor General's office as a non-political appointment as being entirely consistent with the principle of ministerial accountability. The appointee would be responsible to the Attorney General in the same way that every other public servant is responsible for his actions to a designated minister of the crown. These constitutional lines of authority should not diminish the necessity for both law officers subscribing to an elevated conception of their duties to represent the public interest, and especially so when appearing in Charter cases.

F. THE OPERATION DISMANTLE DECISION AND DERIVATIVE CHARTER IMPLICATIONS

So far I have been speaking of the implications of the Charter of Rights and Freedoms particularly in relation to the Attorney General's role and constitutional responsibilities as the government's chief legal adviser, and those of a revised office of Solicitor General, which I perceive

⁴³See Edwards, *Ministerial Responsibility*, chs. 4, 5 & 6.

⁴⁴*Ibid.*, pp. 19, 30-34; see also *Ministry of the Solicitor General Act*, R.S.O. 1980, c. 288 and *Department of the Solicitor General Act*, R.S.A. 1980, c. D-28. Quebec seems about to follow the same path: see Bill 138 tabled in the National Assembly on November 12, 1986.

⁴⁵See *The Attorney General*, pp. 367-372 (re the office of S.G. in Australia) and pp. 388-396 (re the same office in New Zealand). For the position in England and Wales, see *The Law Officers*, pp. 119-131.

to have special importance in the context of Charter litigation. I propose to turn my attention next to examining some of the equally important, and certainly no less contentious, issues that I see arising out of section 32(1) of the Charter. Added force to the significance of this particular provision is derived from the decision of the Supreme Court of Canada in *Operation Dismantle*.⁴⁶

As stated in section 32(1):

32(1) This Charter applies

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament ... and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Although the issues before the Supreme Court involved the actions of the Government of Canada, as opposed to legislation enacted by the Parliament of Canada, the language of section 32 makes it abundantly clear that the potential reach of the Charter extends in like measure to the activities of the executive branch of government at both levels, federal and provincial. Constitutional challenges based on the provisions of the Charter extend beyond the legislative boundaries embodied in sections 91 and 92 of the Constitution Act. Henceforth, all governmental action, derived from whatever source of legal authority, is amenable to scrutiny by the courts provided it can be established that any of the Charter's enumerated rights and freedoms have been infringed or denied or imperilled.

Dickson C.J., speaking for five members of the Court, devoted little time in *Operation Dismantle* to establishing the applicability of the Charter to the federal Cabinet's decision to permit the testing of the cruise missile. He stated:⁴⁷

[C]abinet decisions fall under s. 32(1)(a) of the Charter and are therefore reviewable in the courts and subject to judicial scrutiny for compatibility with the Constitution. I have no doubt that the executive branch of the Canadian government is duty bound to act in accordance with the dictates of the Charter.

One further statement by the court should not be overlooked, inasmuch as it bears on the general provision in section 52(1) of the Charter which declares:

The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. (my emphasis)

⁴⁶[1985] 1 S.C.R. 441.

⁴⁷*Ibid.*, at 455.

Adhering to his previous public statements as to the philosophy that should guide the Court's approach to upholding the constitutionally protected rights and freedoms, Dickson C.J. emphasized that:⁴⁸

[N]othing in these reasons should be taken as the adoption of the view that the reference to "laws" in section 52 of the *Charter* is confined to statutes, regulations and the common law. It may well be that if the supremacy of the Constitution expressed in section 52 is to be meaningful, then all acts taken pursuant to powers granted by law will fall within section 52.

G. FRONTAL ASSAULTS LAUNCHED BY THE HOUSE OF LORDS AND THE SUPREME COURT UPON TRADITIONAL DOCTRINES REGARDING IMMUNITY OF PREROGATIVE ACTS FROM JUDICIAL SCRUTINY

It was left to Wilson J. to address squarely the question whether the terms of sections 32 and 52 encompass actions of the executive branch that derive their legal authority from the royal prerogative as opposed to statute. The translation of decisions by the Cabinet into formal orders-in-council has long been nurtured by the knowledge that whereas the statutory variety (i.e. those based on legislative authority) are amenable to judicial review, the prerogative orders-in-council (i.e. those that derive from the expansive residue of sovereign powers) have hitherto been excluded from judicial assessment and scrutiny. The traditional principle, enunciated by Blackstone⁴⁹ and repeatedly confirmed by later constitutional writers,⁵⁰ has always been that the courts were entitled to determine the limits within which such powers were in fact exercisable but not to review the actual decisions taken in pursuit of the prerogative authority. In recent years there has been a persistent move to challenge the justification for perpetuating this distinction⁵¹ and, prior to the *Oper-*

⁴⁸*Ibid.*, at 459.

⁴⁹*Commentaries*, 15th ed., Vol. 1, pp. 251-252.

⁵⁰Among the leading texts reference may be made to: Chitty's *Prerogatives of the Crown* (1820), pp. 6-7; Dicey, *Introduction to the Law of the Constitution*, 9th ed. (1939), pp. 423-429; Wade & Phillips, *Constitutional Law and Administrative Law*, 9th ed. (by A.W. Bradley, 1977), pp. 232-241; and H.W.R. Wade, *Administrative Law*, 5th ed. (1982), pp. 213-5.

⁵¹For periodical articles commenting upon the C.A. and H.L. judgments in the leading case of *Gouriet v. Union of Post Office Workers*, [1977] Q.B. 729 (C.A.); revd [1978] A.C. 435, see R.W.M. Dias, "Gutter dammerung: gods of the law in decline" (1981), 1 *Legal Studies* 3; D.G.T. Williams, "The Prerogative and Preventive Justice" (1977), 36 C.L.J. 201 and "Preventive Justice and the Courts," [1977] Crim. L.R. 703; H.W.R. Wade, Note: "The Attorney General and the Trade Union" (1978), 94 Law Q. Rev. 4; Note: "Gouriet: The Constitutional Issue and Labour Law Aspects" (1978), 41 Mod. L. Rev. 58; P.P. Mercer, "The *Gouriet* Case: Public Interest Litigation in Britain and Canada," 1979 Public Law 214. For further references to judicial control of prerogative powers, see *The Attorney General*, pp. 29-30, fn. 37; H.W.R. Wade, "Procedure and Prerogative in Public Law" (1985), 101 Law Q. Rev. 180; G.M. Illingworth, "Judicial Review and the Attorney-General," 1985 N.Z.L.J. 176.

ation *Dismantle* case, the House of Lords in *Council of Civil Service Unions et al. v. Min. for the Civil Service*⁵² (familiarily know as the G.C.H.Q. case) mounted a frontal assault that was designed to remove the constitutional barriers to judicial review of prerogative decisions.

Each member of the Appellate Committee recognized that to permit such review would run counter to the great weight of authority on the subject. Nevertheless, the House of Lords was vigorous in declaring that, absent the existence of what were described as "excluded categories" of prerogative authority relating to such areas as national security, the appointment of ministers, the dissolution of Parliament, the granting of honours and the prerogative of pardon, the *process* of exercising the prerogative authority was amenable to judicial review with a view to ensuring that the principles of fairness have been observed.⁵³ As explained by the Law Lords, this does not mean that it is open to the courts to determine whether a particular policy or a particular decision taken in fulfillment of that policy was fair. Judicial review would be restricted to determining whether the *manner* in which those decisions are taken reflects the duty to act fairly, it being recognized that the extent of such a duty will vary greatly from case to case.

Among the "excluded categories" of prerogative powers reviewed by both the House of Lords (in the G.C.H.Q. case) and the Supreme Court of Canada (in *Operation Dismantle*) it is important to note that no reference was made to those prerogatives historically associated with the Law Officers of the Crown.⁵⁴ Familiar examples include the power to stay criminal proceedings⁵⁵ and (under Canadian law only) to prefer a direct indictment,⁵⁶ the exclusive authority to grant immunity to witnesses who agree to appear on behalf of the Crown,⁵⁷ the right to appear *ex officio* as "guardian of the public interest" to protect or enforce public rights,⁵⁸ the power to control the issuance of his fiat with respect to the institution of relator proceedings,⁵⁹ and the right of intervention

⁵²[1985] A.C. 374 (H.L.).

⁵³*Ibid.*, at 398-99 (*per* Lord Fraser of Tullybelton), at 407 (*per* Lord Scarman), at 409-413, (*per* Lord Diplock), at 416-418 (*per* Lord Roskill), at 423-24 (*per* Lord Brightman) querying whether reviewability may extend, in an appropriate case, to "a direct exercise of a prerogative power", a limitation also left unresolved by Lord Fraser, at 398.

⁵⁴See Edwards, *The Law Officers*, chs. 12 and 14, and *The Attorney General*, ch. 6.

⁵⁵For the origins of the power to enter a stay (see *Criminal Code*, R.S.C. 1970, c. C-34, ss. 508 (on indictment and 732.1 (summary proceedings)), see the section on *nolle prosequi* in *The Law Officers*, pp. 227-237 and *The Attorney General*, pp. 444-451.

⁵⁶A comparison between the powers of the English and Canadian Attorneys General in this regard will be found in *The Attorney General*, pp. 434-442.

⁵⁷*Ibid.*, pp. 459-474.

⁵⁸*Ibid.*, pp. 138-145.

⁵⁹*The Law Officers*, pp. 286-295; *The Attorney General*, pp. 139-145.

in a private suit whenever it may affect the prerogatives of the Crown including the Government's relations with foreign states.⁶⁰ Not so many years ago it will be remembered that the House of Lords, in the famous case of *Gouriet v. Union of Post Office Workers et al.*,⁶¹ categorically rejected the view taken in the Court of Appeal by Lord Denning, M.R. who claimed that in matters pertaining to the institution of civil proceedings for injunctive relief against threatened breaches of the law the courts have the right to review the Attorney General's decision and, if necessary, to substitute its views for those of the senior law officer. Each of the Law Lords in that case rejected any jurisdiction on the part of the courts to review and control the Attorney General's decisions in matters affecting public rights and the public interest generally.⁶²

Speaking in the specific context of English law, but in terms that have direct relevance to our present concern with the impact of the Canadian Charter of Rights on the position of the Attorney General, Lord Wilberforce (delivering the leading judgment in *Gouriet*) declared it to be:⁶³

a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney-General enforces them as an officer of the Crown. . . .

That it is the exclusive right of the Attorney-General to represent the public interest — even where individuals might be interested in a larger view of the matter — is not technical, not procedural, not fictional. It is constitutional . . . it is also wise.

Before I revert to the views expressed by the Supreme Court in *Operation Dismantle*, on the significance of our entrenched Charter in reviewing prerogative decisions by the Government or by individual Ministers of the Crown, it may be useful to be reminded again that the House of Lords in *Gouriet* rejected the invitation to stake out a jurisdictional claim whereby the decisions of the Attorney General could become the subject of disputation in the courts. In the words of Lord Fraser:⁶⁴

If the Attorney-General were to commit a serious error of judgment by withholding consent to relator proceedings in a case where he ought to have given it, the remedy

⁶⁰*The Attorney General*, pp. 153-157.

⁶¹[1978] A.C. 435 (H.L.).

⁶²In *The Attorney General*, pp. 129-137, I endeavour to place the *Gouriet* case, as it made its way through the C.A. and the H.L., in both a historical and constitutional context. To obtain the full flavour of the "constitutional crisis" in the relations between the judicial and executive branches of government, as it was perceived at the time, the reader must refer to the pertinent law reports and the parliamentary debates.

⁶³[1978] A.C. 435, at 477, 481 (H.L.).

⁶⁴*Ibid.*, at 524.

must in my opinion lie in the political field by enforcing his responsibility to Parliament and not in the legal field through the courts. That is appropriate because his error would not be an error of law but would be one of political judgment, using the expression of course not in a party sense but in the sense of weighing the relative importance of different aspects of the public interest. Such matters are not appropriate for decision in the courts.

Although, therefore, there may outwardly appear to be a major inconsistency in the attitude adopted by the House of Lords in the *G.C.H.Q.* case, opening the doors to a general reviewability of prerogative decisions made by the executive branch of government, as against the same court's refusal in the *Gouriet* decision to undertake precisely such an exercise with respect to decisions of the Attorney General in matters affecting public rights, we need to remind ourselves again of what one commentator⁶⁵ has described as the veritable nullifying of the *G.C.H.Q.* principles by the range of prerogative matters which the House of Lords has said are not amenable to judicial assessment and review.

It is time now to take a closer look at the implications of the Supreme Court's decision in the *Operation Dismantle* case, following as it did hard on the heels of the landmark decision of the House of Lords in the *G.C.H.Q.* case. Although the actual decision in the *G.C.H.Q.* case preceded the ruling of the Supreme Court of Canada in *Operation Dismantle*, the fact is that the judgments in the latter case took 15 months to prepare following the hearing of arguments. At that point in time the *G.C.H.Q.* case had not surfaced in the English courts⁶⁶ but it moved expeditiously through the appellate system requiring less than 6 months to be disposed of, successively, by the Court of Appeal and the House of Lords. In reading the judgments delivered by the Appellate Committee, to which no reference is made by the Supreme Court of Canada, I find it hard to resist the impression that the views of the Law Lords were very much present in the mind of Wilson J. when she sat down to prepare her judgment in the *Operation Dismantle* decision.

On the question of judicial reviewability of governmental decisions

⁶⁵H.W.R. Wade, "Procedure and Prerogative in Public Law" (1985), 101 Law Q. Rev. 180, at 197-198. Speaking of the English position Professor Wade concludes that "there may be more to it than mere justiciability. The truth is ... that the Crown's powers which are truly prerogative, and not merely powers which it shares with everyone else, are, and will probably remain, outside the scope of judicial review, just as they have been in the past.... All things considered, the House of Lords' expansive statements about the extension of judicial review do not seem likely to lead to any noticeable results."

⁶⁶In delivering this paper at the Symposium on Charter Litigation on February 28, 1986 I incorrectly stated that the English decision appeared not to have been cited in argument before the Supreme Court in the *Operation Dismantle* case. For the reasons stated in the text above this was impossible in the particular circumstances. I regret any embarrassment that this mistake may have caused to counsel who participated in the *Dismantle* appeal.

that are derived from the royal prerogative, Wilson J. was of the same mind as the other members of the court. "Since there is no reason in principle," she observed, "to distinguish between cabinet decisions made pursuant to statutory authority and those made in the exercise of the royal prerogative, and since the former clearly fall within the ambit of the *Charter*, I conclude that the latter do so also."⁶⁷ This brief rejection of any possible reason in principle for separating prerogative decisions of the executive from those which derive their authority from legislation flies in the face of an enormous body of earlier constitutional authority. Surely more substantial grounds were required for casting aside this authority in such a cavalier fashion. On the surface, there may be an absence of any obvious reason for the historical distinction but, as at least one member of the House of Lords was prepared to recognize, the old law regarding the non-reviewability of actual prerogative decisions was "plainly reasonable in relation to many of the most important prerogative powers which are concerned with control of the armed forces and with foreign policy and with other matters which are unsuitable for discussion or review in the law courts."⁶⁸

H. THE JUSTICIABILITY PROBLEM

In fairness, it must be stated that that under the heading of "justiciability" Wilson J. did consider and analyze arguments essentially directed to the same question, viz., the nature of the subject-matter that generally falls within the boundaries of the royal prerogative. It is in this sense that I read Lord Scarman's statement in the *G.C.H.Q.* case when, in describing the present state of administrative law, he stated: "... the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its *source* but its *subject-matter*."⁶⁹

Reading what the Supreme Court of Canada has said on the justiciability of Charter questions involving the prerogative, it seems evident that there may be developing a consensus that evidentiary problems have been exaggerated and that what is really at issue is the appropriateness of the court assuming the role of the nation's forum for resolving disputes that fall within the established categories of prerogative action. An indication of Wilson J.'s approach to this fundamental conundrum is contained in the following passage where she stated:⁷⁰

⁶⁷[1985] 1 S.C.R. 441, at 464.

⁶⁸*Council of Civil Service Unions et al. v. Min. for the Civil Service*, [1985] A.C. 374 (H.L.), at 398 (*per* Lord Fraser).

⁶⁹*Id.*, at 407 (emphasis added).

⁷⁰[1985] 1 S.C.R. 441, at 467, 471. Now that Mr. Justice LeDain has been elevated to the Supreme Court, note should be taken of the views he expressed on the subject of justiciability, when participating in the same case as a member of the Federal Court of Appeal, [1983] 1 F.C. 745, at 747.

We should put difficulties of evidence and proof aside and consider whether as a constitutional matter it is appropriate or obligatory for the courts to decide the issue before us . . .

[T]he courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of state. Equally, however, it is important to realize that judicial review is *not* the same thing as substitution of the court's opinion on the merits for the opinion of the person or body to whom a discretionary decision-making power has been committed.

The question before the court in *Operation Dismantle* was not whether the defence policy of the executive was sound but whether or not it violated the appellants' rights under s. 7 of the Charter of Rights and Freedoms. That, said Wilson J., was a totally different question. Summarizing her conclusions on the case before the court, Wilson J. stated:⁷¹

[I]f we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to "second guess" the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the Charter to do so.

An indication of the extent to which these views represent the approach that can be expected of the Supreme Court when questions arise under s. 32(1) or (2) of the Charter challenging the exercise of prerogative discretion, is to be found in the intimation by Dickson C.J.C. that he "agreed in substance"⁷² with his colleague's discussion of justiciability, added to which was the fairly emphatic statement: "I have no doubt that disputes of a political or foreign policy nature may be properly cognizable by the courts."⁷³

I. JUDICIAL REVIEW OF PREROGATIVE DECISIONS BY THE ATTORNEY GENERAL — OPENINGS AND DIFFICULTIES UNDER THE CHARTER

In the light of these statements of principle extracted from the Supreme Court's decision in *Operation Dismantle*, in what direction is Canadian law being steered with respect to the reviewability of the Attorney General's prerogative decisions? Of the wide range of discretionary powers exercisable by the Attorney General or his agents I propose to confine my attention in this paper to the preferring of an indictment

⁷¹[1985] 1 S.C.R. 441, at 472.

⁷²*Ibid.*, at 459.

⁷³*Loc. cit.* The Chief Justice's judgment also represented the views of Estey, McIntyre, Chouinard and Lamer JJ.

and entering a *nolle prosequi* or a stay of proceedings. These powers represent some of the most sensitive and formidable instances of the law officer's authority. Originally their legality derived from prerogative roots in English law but they are now to be found embedded in specific provisions of the Criminal Code.⁷⁴ An initial question, therefore, is whether, for the purposes of judicial review, the incorporation into legislation of former prerogative powers automatically precludes any consideration of the original source of the same powers? Without expressing a final opinion, it does seem unconvincing to attempt to perpetuate the importance of the original source of the Attorney General's powers when — at least so far as Canada is concerned — Parliament has declared the scope and conditions that must govern the present application of these forms of extraordinary discretion. Enlightenment should certainly be sought from the authorities that document the historical evolution of the Attorney General's prerogative powers, but the primary emphasis must be accorded to the present formulations in the Criminal Code.⁷⁵

The preferable approach is to concentrate on the subject-matter of the discretionary power and to endeavour to gain a better understanding of the process by which the decisions in question are reached. So little is publicly known of the considerations that enter into prosecutorial decision making that reviewability is fraught with obvious difficulties. There are, however, increasing indications, in the form of published principles and guidelines issued, for example, under the authority of the Attorneys General of England and Wales, Australia and the United States,⁷⁶ that the problems of justiciability with respect to prosecution decisions may be met in some part by the initiatives taken by the Law Officers themselves. A closer study of these guidelines will reveal the wide range of pertinent factors that come into play in every case. In addition to the legal and evidentiary aspects of the charge, the prosecution

⁷⁴See *supra* notes 53 and 54; *infra* note 73.

⁷⁵In any approach to this problem it must be recognized that distinct differences exist between the prevailing English position and the provisions of the Canadian *Criminal Code* with respect to the Attorney General's powers to present indictments and to order a stay of proceedings. See *supra* notes 53 and 54. The disinclination of the Australian and New Zealand courts to intrude on the exercise of the Attorney General's powers in presenting indictments or in entering stays is reflected in the following cases: *Barton v. R.*; *Gruzman A.G. for N.S.W. & Others* (1980), 32 A.L.R. 449 (H.C. of A.), *Daemar v. Gilliland*, [1979] 2 N.Z.L.R. 7 (S.C.); *Saywell v. A.G.*, [1982] 2 N.Z.L.R. 97 (H.C.); and *Tindal v. Muldoon & Others* (1985), 11 C.L.R. 71. For an indication of the disposition of the Supreme Court of Canada to contemplate the expansion of its reviewing powers with respect to decisions taken by an Attorney General *cf.* the views expressed in *Dowson v. The Queen* by the Ontario Court of Appeal (1981), 62 C.C.C. (2d) 286 at p. 288 with those of Lamer J., delivering the judgment of the S.C.C. in [1983] 2 S.C.R. 144 at 155.

⁷⁶See Edwards, *The Attorney General*, pp. 431-434.

authorities must in each case be satisfied that the decision to proceed or not to proceed reflects the best assessment of what is in the public interest.⁷⁷

Total objectivity in assessing the broad range of discretionary factors that relate to prosecutorial decisions is an unattainable goal. Nevertheless, there may well be inherent advantages, for example, in incorporating into a publicly accessible document those matters that should not be allowed to influence the decision to initiate, to continue or to stay criminal proceedings. Among these I would expect to find considerations based on the prospective accused's race, religion, sex, national origin, political beliefs or political associations. And I regard it as clearly wrong for the Attorney General, in exercising his discretionary authority, to discriminate in favour of his political colleagues or supporters or against his political opponents, simply because they are his supporters or opponents. In the same vein I would expect the guidelines to reject as unacceptable considerations the prosecutor's personal feelings towards the defendant or the victim and also the possible effect of the Crown Attorney's decision on his professional standing within the government legal service.

At present, to the best of my knowledge, there does not exist anywhere in Canada a "prosecutor's manual" that enjoys the description of a public document. Some of the provincial Attorneys General have seen fit to disclose publicly the occasional directives that they issue, and in other provinces a consolidated set of policies exists for the private and professional use of prosecutors. In my view, the time has come when serious attention must be given by every Attorney General in this country to issuing for public information a formal document bearing the signature of the Attorney General and which sets forth the general principles and relevant considerations that must govern the handling of individual prosecutions of the official directly in charge of each case. As stated earlier, there is no want of comparative models by which to judge both the substantive content of such compilations and the quality of their adherence to the principles of openness and accountability.

I do not underestimate the arguments that will be advanced in opposition to relinquishing the traditional cloak of secrecy that has surrounded the decision-making activities of those who prosecute in the name of the Crown. I would remind those inclined to oppose the adoption of a more open approach to disclosure of the straws that are blowing in the wind in the wake of the expansive interpretation accorded by the Supreme Court of Canada to section 7 of the Charter. Failure to take the initiatives suggested in this paper may well result in a successful challenge to a particular prosecution on the ground that the accused's

⁷⁷*Ibid.*, pp. 423-429.

right not to be deprived of his liberty is infringed by the failure to adhere to the principles of fundamental justice that require prior disclosure to the public at large of the general considerations to which the Crown's decisions must be shown to conform.

On the related subject of judicial reviewability of prerogative actions taken by the Attorney General or his agents, it would surprise me if the Canadian courts were to diverge markedly from the position reflected in the earlier jurisprudence on this subject.⁷⁸ Whether or not to prosecute, whether to grant immunity, whether to enter a stay of proceedings — these distinctive examples of the Attorney General's prerogative authority are likely to be regarded as falling within the "excluded categories" mentioned in the *G.C.H.Q.* and *Operation Dismantle* cases. In estimating the probable direction that will be taken by the courts the historical antecedents of the Attorney General's powers are bound to exert a strong influence. Even more significant, however, is the likely disinclination of the bench to become generally embroiled in evaluating the broad range of variables that permeate any decision to invoke or stay the criminal process. Some confirmation of this assessment may be inferred from the judicial reluctance to exercise the co-equal jurisdiction conferred upon judges of the superior courts, with that of the Attorney General, to prefer a direct indictment.⁷⁹

The release for public examination of prosecutorial guidelines, along the lines suggested in this paper, might well herald a greater inclination on the part of aggrieved citizens to apply for judicial review of prosecutors' decisions. In addition, we have to recognize that the advent of section 32 of the Charter of Rights into Canadian law gives prospective litigants an enormous advantage, inasmuch as the issue of justiciability of such claims will primarily rest on the petitioner's ability to demonstrate that one of the enumerated rights or freedoms has been infringed by the action of the Attorney General or his representative. Still, major obstacles face the prospective litigant who seeks the intervention of the court to subject the prosecutor's actions to a substantive or procedural reassessment. To overcome these obstacles the plaintiff will have to adduce evidence establishing bad faith, personal bias or other grounds of abuse of the discretionary power. Alternatively, the evidence must point to the particular decision having been dictated by extraneous or improper considerations to such an extent that the basic principles of fairness have been violated.

These are formidable burdens to discharge, given the innate reluctance of the Attorney General and his agents to disclose to the court the relative weight attached to the range of diverse considerations in

⁷⁸See *supra* notes 6 and 7.

⁷⁹The relevant authorities are collected together in *The Attorney General*, p. 438, *infra* 60 & 61.

individual cases. The abuse of process doctrine, pulled hither and thither since it was first introduced into Canadian law in *R. v. Osborn*,⁸⁰ has now been finally sanctioned by the Supreme Court in *R. v. Jewitt*,⁸¹ thus pointing again to a more receptive attitude towards the judicial examination of questionable instances of the Attorney General's discretion. And although the Court of Appeal in *Nelles v. R. in Right of Ontario*⁸² declined to tamper with the absolute immunity of Crown prosecutors from malicious prosecution suits, an immunity that was said to derive from the common law, the day may not be too far distant when this unqualified immunity may be curtailed in circumstances where clear evidence of "malice" is forthcoming and where the foundations of the common law doctrine may be shown to be less substantial than has been generally accepted. Furthermore, I believe that all the Charter arguments reviewed in this paper will apply with equal force to malicious prosecution suits, a possibility that was rightly acknowledged by Thorson J. A., delivering the judgment of the Court of Appeal in the *Nelles* case.⁸³

None of these arguments, it must be emphasized again, is directed towards asking the court to substitute its judgment for that of the prosecutor. If reviewability is to be entertained the focus of attention must be on the *process* of exercising the discretionary authority. Permitting this extremely limited access to the courts for judicial review should not be seen as an erosion of the Attorney General's traditional position in relation to the bench. On the contrary, it should be viewed as a legitimate avenue for the citizen to pursue and one that is entirely consonant with the accountability of the Attorney General to the legislative body for a full explanation and defence of his immense constitutional powers.

⁸⁰[1969] 4 C.C.C. 185 (Ont. C.A.). Delivering the unanimous judgment of the C.A., Jessup J.A. relied heavily on the views expressed by the H.L. (especially Lord Devlin) in *Connolly v. D.P.P.*, [1964] A.C. 1254 (H.L.).

⁸¹[1985] 2 S.C.R. 128. All the important appellate decisions that touched upon the dispute post-*Osborn* and post-*Rourke*, ([1978] 1 S.C.R. 1021) are reviewed in the unanimous judgment of the S.C.C. in *Jewitt*, delivered by Dickson C.J.C. In acknowledging that a residual discretion exists in a trial judge to stay proceedings to prevent the abuse of the court's process or if "those fundamental principles of justice which underlie the community's sense of fair play and decency" would be violated, the S.C.C. emphasized that the inherent power is to be exercised only in the "clearest of cases": (at 136-7).

⁸²(1985), 51 O.R. (2d) 513 (C.A.).

⁸³*Ibid.*, at 540.

The Role of the Attorney General and the Charter of Rights*

Ian G. Scott †

Introduction

The purpose of this paper is to discuss the role of the Attorney General, with particular regard to the impact of the Canadian Charter of Rights and Freedoms on that role.

The starting point for any discussion of the Attorney General's responsibilities must be the relevant statutory provisions. In Ontario, s. 5 of the Ministry of the Attorney General Act, R.S.O. 1980, c. 271, provides:

5. The Attorney General,
 - (a) is the Law Officer of the Executive Council;
 - (b) shall see that the administration of public affairs is in accordance with the law;
 - (c) shall superintend all matters connected with the administration of justice in Ontario;
 - (d) shall perform the duties and have the powers that belong to the Attorney General and Solicitor General of England by law or usage, so far as those duties and powers are applicable to Ontario, and also shall perform the duties and have the powers that, up to the time of the *British North America Act, 1867* came into effect, belonged to the offices of the Attorney General and Solicitor General in the provinces of Canada and Upper Canada and which, under the provisions of that Act, are within the scope of the powers of the Legislature;
 - (e) shall advise the Government upon all matters of law connected with legislative enactments and upon all matters of law referred to him by the Government;
 - (f) shall advise the Government upon all matters of a legislative nature and superintend all Government measures of a legislative nature;

* Paper presented at the Canadian Bar Association Seminar in Montreal, October 24-25, 1986, "Preparing and Presenting Charter Cases".

† Attorney General of Ontario.

- (g) shall advise the heads of the ministries and agencies of Government upon all matters of law connected with such ministries and agencies;
- (h) shall conduct and regulate all litigation for and against the Crown or any ministry or agency of Government in respect of any subject within the authority or jurisdiction of the Legislature;
- (i) shall superintend all matters connected with judicial offices;
- (j) shall perform such other functions as are assigned to him by the Legislature or by the Lieutenant Governor in Council.

Similar provisions exist in the federal Department of Justice Act, R.S.C. 1970, c. J-2, ss. 4 and 5, as well as in the legislation of most of the other provinces: Department of the Attorney General Act, R.S.A. 1980, c. D-13, s. 2; Attorney General Act, R.S.B.C. 1979, c. 23, s. 2; Attorney General's Act, R.S.M. 1970, c. A170, s. 3, as amended; Department of Justice Act, R.S.N. 1970, c. 85, ss. 9 and 10, as amended; Public Service Act, R.S.N.S. 1967, c. 255, s. 4; Department of Justice Act, R.S.Q. 1977, c. M-19, ss. 3 and 4, as amended; the Department of Justice Act, S.S. 1983, c. D-18.2, ss. 9 and 10.

The Ontario section was enacted in 1969. It implements a recommendation of the Report of the Royal Commission Inquiry into Civil Rights, conducted by the Honourable J. C. McRuer, formerly Chief Justice of Ontario's High Court of Justice. The McRuer Report recommended that Ontario follow the lead of several other Canadian jurisdictions by defining expressly by statute some of the powers and duties pertaining to the office of the Attorney General (McRuer Report, at pp. 931, 954). The McRuer Report summarized its reasons for such a statute as follows (at p. 954):

We think that there is a decided advantage in having an Attorney General Act which specifically sets out the functions and duties of the holder of the office. Such a statute would leave no doubt as to who is responsible for the legal affairs of the Province, and who is accountable if legislation should be introduced which fails adequately to safeguard civil rights.

Specific comments on several of the statutory provisions referred to above will be made later in this paper. At this point, however, it bears emphasizing that, under cl. 5(b) of the

Ontario Act, the Attorney General has a positive duty to ensure that the administration of public affairs complies with the law. Any discussion of the Attorney General's responsibilities must keep this fundamental obligation in mind.

Criminal Prosecutions

One of the most important of the Attorney General's responsibilities, encompassed by cl. 5(d) of Ontario's Ministry of the Attorney General Act, is the power to institute or stay criminal proceedings. Decisions on prosecution policy must be made on a daily basis and represent one of the Attorney General's historical functions. Although responsibility for prosecutions obviously pre-dates the Charter of Rights, the traditional constitutional requirements that have applied to the Attorney General's exercise of prosecutorial authority provide a valuable perspective on the way in which the Attorney General should approach other duties to which the Charter may be related. The constitutional position of the Attorney General in making prosecutorial decisions is quite clear. The McRuer Report describes this position as follows (at pp. 933-4):

[The Attorney General] must of necessity occupy a different position politically from all other Ministers of the Crown. As the Queen's Attorney he occupies an office with judicial attributes and in that office he is responsible to the Queen and not responsible to the Government. He must decide when to prosecute and when to discontinue the prosecution. In making such decisions he is not under the jurisdiction of the Cabinet nor should such decisions be influenced by political considerations. They are decisions made as the Queen's Attorney, not as a member of the government of the day.

Another frequently quoted statement to the same effect was made by Viscount Simon, speaking as Attorney General of England in 1925 (as quoted in J. Edwards, *The Law Officers of the Crown* (1964), p. 215):

I understand the duty of the Attorney General to be this. He should absolutely decline to receive orders from the Prime Minister, or Cabinet or anybody else that he shall prosecute. His first duty is to see that no one is prosecuted with all the majesty of the law unless the Attorney General, as head of the Bar, is

satisfied that a case for prosecution lies against him. He should receive orders from nobody.

As these quotations indicate, issues of whether to institute or discontinue a prosecution are not matters of government policy. The Premier and Cabinet have no power to direct whether a particular prosecution should be pursued or whether a particular appeal should be undertaken. These decisions rest solely with the Attorney General, who must be regarded for these purposes as an independent officer, exercising a function that in many ways resembles the functions of a judge.

Questions of prosecution policy are legal issues and, while considerations of the public interest are vital in determining these questions, prosecutorial decisions must be made according to legal criteria. The Attorney General's assessment of the public interest must absolutely exclude any consideration of the political implications of a particular decision. Public respect for the rule of law demands that prosecutorial decisions be made objectively, without regard to possible political consequences. This principle has been reiterated on several occasions. For example, Sir Hartley Shawcross, speaking as Attorney General of England, once stated (as quoted in Edwards (1964), at pp. 222-3):

There is only one consideration which is altogether excluded [from the decision whether or not to prosecute] and that is the repercussion of a given decision upon my personal or my party's or the government's political fortunes: that is a consideration which never enters into account.

Similarly, former Attorney General of Canada, Ron Basford, stated (as quoted in J. Edwards, *The Attorney General, Politics and the Public Interest* (1984), p. 360):

There must be excluded any consideration based upon narrow, partisan views, or based on the political consequences to me or to others. In arriving at a decision on such a sensitive issue as this, the Attorney General is entitled to seek information and advice from others but in no way is he directed by his colleagues in the government or by Parliament itself.

The proper relationship between the Attorney General and his or her Cabinet colleagues on questions of prosecution policy is described by Sir Hartley Shawcross in the following passage (quoted in Edwards (1984), at p. 319):

The true doctrine is that it is the duty of the Attorney General, in deciding whether or not to authorize the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other consideration affecting public policy. In order so to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the government, and indeed, as Lord Simon once said, he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations which might affect his own decision, and does not consist, and must not consist, in telling him what that decision ought to be. The responsibility for the eventual decision rests with the Attorney General, and he is not to be put, and is not put, under pressure by his colleagues in the matter.

Professor John Edwards, author of the leading authorities on the office of the Attorney General, summarizes the role of the Attorney General as follows (Edwards (1984), at p. 360):

An Attorney General who seeks to sustain his privileged constitutional status as the guardian of the public interest, in the widest sense of that term, may seek, and frequently would be seriously at fault in failing to do so, advice from whatever quarter, ministerial or otherwise, that may help to illuminate the decision confronting him. What is absolutely forbidden is the subjection by the Attorney General of his discretionary authority to the edict of the Prime Minister or the Cabinet or Parliament itself. Parliament has the right to question and criticise the Law Officers. It does not have the right to direct them in the discharge of their constitutional duties.

The absolute independence of the Attorney General on questions of prosecution policy is accepted as an important constitutional principle. An attempt to interfere with that independence is generally considered to have caused the defeat, in 1924, of the first British Labour Government. The circumstances of that event are carefully reviewed in Professor Edwards' two books on the office of the Attorney General, *The Law Officers of the Crown* (1964), pp. 199-225 and *The Attorney General, Politics and the Public Interest* (1984), pp. 310-18.

One consequence of the Attorney General's authority over prosecution policy is that, if the Attorney General is satisfied

that a statutory provision creating an offence is unconstitutional or that a prosecution would violate an individual's civil rights, it is quite clearly within the Attorney General's authority to stay the prosecution. This was equally true prior to the enactment of the Charter of Rights, but the specific rights guaranteed by the Charter may enlarge the circumstances in which the Attorney General exercises the power to discontinue prosecutions.

Government Legislation

Clauses 5(e) and (f) of Ontario's Ministry of the Attorney General Act specifically give the Attorney General the responsibility to advise the government on all matters of law connected with legislative enactments and to superintend all government measures of a legislative nature.

Prior to the Charter of Rights, the legislative issues dealt with by the Attorney General fell into two principal categories. First, the Attorney General's advice was frequently sought on questions of administrative law, particularly the procedures necessary to comply with the requirements of natural justice. Issues of this kind, relating to the proper methods of determining the legal rights of individuals, were seen as requiring the independent perspective of the Attorney General. The McRuer Report commented on this function as follows (at p. 945):

We are concerned with something much more than orderly drafting. We are concerned with legislative supervision in a broad sense. The duty of the Attorney General to supervise legislation imposes on him a responsibility to the public that transcends his responsibility to his colleagues in the Cabinet. It requires him to exercise constant vigilance to sustain and defend the Rule of Law against departmental attempts to grasp unhampered arbitrary powers, which may be done in many ways.

Many of the recommendations of the McRuer Report dealt with the procedural safeguards that should exist when administrative tribunals are established to determine legal rights. These recommendations resulted in the Civil Rights Statute Law Amendment Act, S.O. 1971, c. 50, an omnibus Bill introduced by the Attorney General of the day to ensure procedural

fairness in provincial administrative tribunals. The Attorney General continues to be consulted on issues of this kind.

The second type of legislative issue dealt with by the Attorney General prior to the Charter of Rights involved questions of constitutionality. At that time, these questions were largely limited to issues of the allocation of federal and provincial legislative responsibilities.

The advent of the Charter of Rights has added dramatically to the Attorney General's responsibility to advise the government on legislative matters. Questions arise on virtually a daily basis about whether existing statutes or proposed legislation comply with the Charter of Rights. The nature of these questions is essentially the same as the second category of legislative issues previously dealt with by the Attorney General. In both cases, the question is whether the legislation is constitutionally valid. However, the grounds of possible challenge under the Charter of Rights are so much more extensive that the frequency with which issues now arise has increased dramatically. In addition, the Charter of Rights often involves issues in which legal and social policy considerations are difficult to separate, with the result that the complexity of issues has also increased significantly. The legislation introduced across Canada in recent years to bring statutes into compliance with the Charter of Rights is a partial measure of the additional responsibilities that have fallen to each Attorney General.

In advising on questions of constitutionality, the Attorney General must give paramount consideration to the obligation to ensure that government action complies with the law, in this case the supreme law of Canada. The giving of constitutional advice must be carried out with the same independence and detached objectivity with which the Attorney General approaches questions of prosecution policy.

There is, however, a significant difference between the Attorney General's role in prosecutions and his or her role as a constitutional adviser on legislation. With respect to prosecution policy, the Attorney General has exclusive authority to make decisions. With respect to legislative policy, however, the Attorney General's role is that of an adviser. Government

decisions on whether to introduce specific legislation rest with Cabinet as a whole, not with the Attorney General alone. As former English Attorney General S. C. Silkin has stated ("The Functions and Position of the Attorney General in the United Kingdom", *The Parliamentarian* (1978), Vol. 59, at p. 153):

It is the duty of the Law Officers of the Crown to advise their fellow Ministers and government departments both as to the law and as to the constitutional proprieties. They are responsible for recommending to their colleagues what can properly be done within the law and what can not. The decisions are those of their colleagues. But they will not lightly ignore the advice of the Law Officers upon matters falling within the Law Officers' responsibility.

Professor Edwards also seems to accept the possibility of Cabinet choosing to disregard the advice of the Attorney General on questions of legislative policy, although he points out that this would be very rare in situations where legal considerations are paramount. Speaking with particular reference to the British context, Professor Edwards states (Edwards (1984), at p. 190):

As [the government's chief legal adviser], the Attorney General, together with his colleague the Solicitor General, occupies the same degree of constitutional independence as that associated with his position as the State's chief prosecutor responsible for, and ultimately in control of, all prosecutions ... A Minister who elects to do battle with the Attorney General on [a policy issue with legal implications] may discover that he has backed a losing horse, unless he can persuade his Ministerial colleagues that the Attorney's legal opinion should receive minimal importance in their overall balancing of the policy considerations involved. Even in cases of conflict of this nature much will depend on the kind of policy issues that are involved. In such matters as international litigation involving problems associated with the seabed and the continental shelf, or in the interpretation of the law relating to legal picketing or human rights under EEC law, the paramountcy of the Law Officer's opinion may less readily be questioned than in such other areas as trade, employment, social security, environment and defence where the aspects of legal policy would tend to be viewed as more peripheral than central.

Professor Edwards also states (Edwards (1984), at pp. 189-90):

No less important is the appreciation by everyone concerned as to the scope of the Law Officer's authority and the degree of

independence with which the Attorney General and the Solicitor General discharge their advisory functions. These questions assume major importance when law and policy issues are seen to be intertwined in the reference to the Law Officers ... There will be times when the Attorney General, perceiving the legal implications of the department's proposed course of action, will find it necessary to oppose the Minister's declared policy and to do so, if informal persuasion fails, within the appropriate Cabinet committee, or in Cabinet itself. Such opposition must derive from the legal implications of the proposed policy if it is to carry the full weight of the Law Officer's position. For the government to reject such advice would be quite exceptional and might reasonably be expected to lead to serious questioning by the Attorney General of his continuing to serve as the government's chief legal adviser.

The emphasis that Professor Edwards places in these passages on the Attorney General's opposition being based on legal considerations deserves comment. In cases where legal and social policy is closely intertwined, as will often be the case in situations involving the Charter of Rights, the Attorney General must take care, in giving advice, to distinguish between legal opinion and policy preference. If the Attorney General gives a legal opinion that a suggested course of action is unconstitutional, a decision by the government to proceed in the face of the opinion would place the Attorney General in direct conflict with the obligation to ensure that government action meets legal requirements. However, no direct conflict would arise if, in selecting between two possible courses of action, both of which were considered constitutional by the Attorney General, the government chose to reject the Attorney General's policy preference.

An interesting feature of the federal Department of Justice Act is s. 4.1, enacted in 1985 by the Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act, S.C. 1985, c. 26, s. 106, proclaimed in force August 13, 1985. The section requires the Minister of Justice to examine every Bill introduced by a Minister of the Crown and to report to the House of Commons any inconsistencies with the Charter of Rights. This section gives the federal Attorney General additional leverage in dealing with Cabinet colleagues that may be useful in resolving occasional differences of opinion on the require-

ments of the Charter of Rights. As a practical matter, however, even in jurisdictions without such a provision, care must be taken long before legislation is introduced to avoid placing the Attorney General in the position of failing to meet the obligation to ensure compliance with constitutional requirements.

Civil Litigation

The Attorney General has two separate roles with respect to civil litigation. Pursuant to cl. 5(h) of Ontario's Ministry of the Attorney General Act, the Attorney General has the responsibility to conduct and regulate all litigation for and against the Crown. As part of the historical powers inherited from the Attorney General of England through cl. 5(d) of the Act, however, the Attorney General has much wider authority to assert claims on behalf of the public interest to enforce public legal rights. This power is exercised as an officer of the Crown, representing the Crown's *parens patriae* authority. A recent statement of this traditional responsibility appears in the well-known House of Lords' decision, *Gouriet v. Union of Post Office Workers*, [1977] 3 W.L.R. 300, [1977] 3 All E.R. 70. Lord Wilberforce described the Attorney General's role as follows (at p. 310 W.L.R., p. 80 All E.R.):

It can be properly said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney-General enforces them as an officer of the Crown.

The Attorney General's standing to represent the public interest in court proceedings can be used in different ways. For example, the Attorney General may seek to intervene in private litigation that raises important public issues. In the case of constitutional issues, such as issues raised under the Charter of Rights, Ontario's Courts of Justice Act, S.O. 1984, c. 11, s. 122, specifically requires that the Attorney General be notified and given an opportunity to participate in litigation challenging the constitutional validity or applicability of an Ontario statute. The proper representation of the public interest in

some of these cases may well require that the Attorney General argue that the challenged statute violates constitutional guarantees. The faithful exercise of the Attorney General's responsibility to represent the public interest requires an independent and objective assessment of the circumstances of each case.

In *Re Blainey and Ontario Hockey Association* (1986), 26 D.L.R. (4th) 728, 54 O.R. (2d) 513 (C.A.), a lawyer employed by the Ontario Ministry of the Attorney General appeared on behalf of the Ontario Human Rights Commission to argue that a provision of the Human Rights Code, S.O. 1981, c. 53, infringed the equality rights guarantee of the Charter of Rights. Mr. Justice Dubin of the Ontario Court of Appeal commented on this procedure as follows (at p. 746 D.L.R., p. 531 O.R.):

Counsel for the commission supported the appellant's contention that s. 19(2) of the *Human Rights Code* was unconstitutional. Normally counsel for a tribunal, where its enabling statutory authority is under attack, supports the jurisdiction conferred upon it by its enabling statute or submits its rights to the court. However, it is well known that with the introduction of s. 15(1) of the Charter, all branches of government are giving close scrutiny to legislation previously enacted with a view of satisfying themselves that it is now consistent with the Charter. That study has obviously been undertaken by the Human Rights Commission and, under such circumstances, I think it quite appropriate for counsel to provide the benefit of that review to the Court.

It has also been suggested that, in exceptional circumstances, the Attorney General could use legal proceedings against one of his or her Cabinet colleagues to stop activity that would contravene the Charter of Rights. If a dispute occurred between the Attorney General and another Minister with respect to government action that, in the Attorney General's opinion, contravened the Charter, Professor Edwards has stated (Edwards, "The Attorney General and the Charter of Rights", University of Toronto Symposium on Charter Litigation, February 28, 1986):

If [the Attorney General] views his functions as restricted to that of ensuring that the government is represented by counsel in the

ensuing litigation, thereby acting in strict accordance with his statutory duty "to conduct and regulate all litigation for and against the Crown or any ministry or agency of Government in respect of any subject within the authority or jurisdiction of the Legislature", it is my opinion that the Attorney General would be in serious dereliction of his larger constitutional duty to ensure that the wider public interest is adequately represented. It is not enough to assume that a public spirited citizen or interest group will step forward to assert a challenge under the auspices of the Charter. It should not be sufficient to ensure that the necessary funding is forthcoming to maintain such a suit, including the costs of providing legal counsel to represent the citizens' claims. These alternative exigencies may well provide sufficient rationale to meet most of the deserving claims for support recognition. The door, however, must be left open, in my judgment, for the extraordinary demonstration of the Attorney General's independent status and independent responsibilities by way of active representation in the courts, in his own person if that is necessary, to argue the case on behalf of the public interest.

Respect for the Attorney General's constitutional advice would, it is to be hoped, avoid the necessity for such confrontations. There do not appear to be any examples of an Attorney General taking court action against a Cabinet colleague. There are, however, interesting precedents involving active participation by Attorneys General in public inquiries where it was possible that the inquiry could find evidence of wrongdoing by other members of the government. For example, in 1948 Attorney General Sir Hartley Shawcross took an active role before the Lynskey Tribunal investigating allegations of corruption against several Ministers of the Crown and other public officials. Sir Hartley Shawcross explained his decision to participate in the inquiry in the following terms (as quoted in Edwards (1964), at p. 298):

I felt myself . . . that it was of the utmost importance from the public point of view to maintain a position that it was the duty (however personally unpleasant) of His Majesty's Attorney General to represent the public interest with complete objectivity and detachment, and that to refuse to discharge that duty in a particular case in which the public interest might be suspected to conflict with the interests of certain of his friends or of his political colleagues would be tantamount to saying that the office itself was inadequate to represent and protect the public interest against whosoever might challenge it. It was in many ways a very

distasteful decision to have to make, but I hope it helped to consolidate the Attorney-General's right and duty — and that is what I emphasise in these matters — the duty — to be wholly detached, wholly independent and to accept the implications of an obligation to protect what he conceives to be the public interest whatever the political results may be.

Conclusion

The many new issues that will be faced by society as a result of the Charter of Rights will provide unique opportunities to enhance the rights and freedoms of Canadians. It is important, at this time, to remind ourselves of the progress that can be made towards this goal through the Attorney General's obligation to ensure that government activities and legislation comply with constitutional requirements. The public and the legal profession should be vigilant to see that the Attorney General vigorously pursues this obligation in a manner that respects the fundamental principles of independence and objectivity that have historically guided the exercise of the Attorney General's responsibilities.

The Honourable Ian Scott*

LAW, POLICY, AND
THE ROLE OF THE ATTORNEY GENERAL:
CONSTANCY AND CHANGE IN THE 1980S†

I have now been the attorney general for two and one-half years. It is a natural question to ask what I have learned and how my expectations about this important office of state have been met. I propose to raise some considerations about the office and about the role of the attorney general in private and public matters.

I have two theories that I want to advance, the first simple and, I believe, straightforward, the second more complex and perhaps more contentious. The first is that the complexity and the wide variety of decisions that an attorney general must make in a rights-driven society make it essential that the independent nature of the attorney general's role as a guardian of prosecutorial and constitutional values be maintained and fortified. The second is that an independent attorney general should have, and I believe in our system does have, a very special role to play (apart from his litigation role) in the policy-making process of government. Before I can develop these themes, it is necessary to say a few words about the changing social context in which an attorney general (and indeed all politicians) finds himself in the late 1980s.

The New Ontario

In the last twenty-five years our community has changed fundamentally. It is my contention that those changes have produced a redirection, a new purpose, in the role of the attorney general. How has the province changed? First of all, Ontario is increasingly pluralistic. We live in a diverse society made up of a wide variety of races and religious backgrounds. There is no 'melting-pot.' Diversity is a given, and has for our people a value of its own.

Second, we have become, in a striking way, a rights-oriented society. The courts are increasingly perceived by our citizens as the appropriate forum for profound social and economic changes. Politics itself is increasingly dominated by the rhetoric of rights. Our people have

* Attorney General of Ontario

† This paper is an edited version of the Goodman Lectures delivered at the University of Toronto Faculty of Law on 10 and 11 February 1988.

exhibited, through their politicians, a pronounced commitment to 'constitutionalize' all values or entitlements that as groups or as individuals we feel we deserve or need. We have displaced an age in which a parent, a confessor, a teacher, or a doctor was the community resource from which one sought relief or accommodation. There is now no 'right,' and few social, economic, or cultural 'needs,' which most citizens feel should not be 'constitutionalized' or at least be at the disposition of a court.

Third, there is an absence of shared expectations about our social, economic, or political objectives as a community. This is especially so in our criminal law. I give two examples. When I went to school the provisions of the law that related to abortion, or to Sunday shopping, by and large represented the shared expectation of the community about what was and what was not appropriate conduct. All that has now changed forever. It is hard to think of a law, with the possible exception of the Registry Act, that represents the shared expectation of the community about what is appropriate or inappropriate conduct in our society. That is the virtue, or the price, of a pluralistic community.

Fourth, there is an increased expectation on the part of the public that government will provide a range of services and policy responses to deal with almost all of the contingencies of life. I make this observation not to criticize but merely to acknowledge that reality.

Finally, there is the presence of the Charter of Rights and Freedoms. The Charter is without doubt the most important legal (and perhaps the most important social and economic) event of the past generation in Canada. It not only defines old rights but creates new rights; most important, the Charter not only permits *but requires* the courts to displace Parliament and the legislature in evaluating the wisdom of policy choices that contravene those rights. That is the special mandate of section 1 of the Charter.

An interesting example of the complexity of the new realities we confront is the recent case of *R. v. Morgentaler*.¹ I refer to it not because it raised a difficult and important question, but rather because it exemplifies most, if not all, of the social changes to which I have referred. Twenty-five years ago that case would simply not have arisen, and, if by any chance it had, it would not have been decided as it was.

Recently I sat in on Professor Dickens's seminar on law and medicine. There it occurred to me that we cannot, even at this early stage, say with assurance what the *Morgentaler* case is about. Is it about criminal law? Is it about what a health service is? Is it about the provision of health services? Is it about access to health services? Is it about what priorities will be

¹ *Morgentaler, Smoling and Scott v. The Queen* (1988) 37 CCC (3d) 449 (SCC)

established for this health service as opposed to another health service? In truth, the case is about all of those things at one level or another; none the less, it began simply enough as a case dealing with the enforcement of a criminal statute.

From the criminal law perspective, there were questions about initiating the prosecution; there were questions whether there should be interim relief; there were questions whether there should be bail conditions to prevent the accused from continuing his work; there were questions whether there should be fuller, or more, or other prosecutions; there were questions whether the prosecutions, once commenced, should be stayed. But we do not have to reflect long to understand that *Morgentaler* will have an impact not only on women's health issues and the provision of abortion services, but also on the right to health services more generally and the manner of payment for those services.

To a lawyer who graduated a generation ago, it seems extraordinary that a criminal case should raise such questions. But this case, and its broad, social, economic, and political fallout, is, I believe, not atypical; in fact, it will be a routine legal phenomenon in the next generation.

The policy implications of this new kind of litigation for government and citizens are important and often unpredictable. I can illustrate the point. The government of Ontario at present is confronted by a case brought by a 'same-sex couple' who live together and who want to receive OHIP benefits at rates available to those who live in a traditional spousal relationship. The straightforward legal issue is the definition of 'spouse' in the health legislation – a narrow, superficially technical question. That narrow legal issue, of course, raises an important question of policy with major financial implications for the taxpayer and the administration of the provincial health insurance plan. When we prepared our response in that case, we identified some seventy-nine other statutes or tax-supported programs that will be affected in one way or another by the court's decision. Therefore, the section 1 Charter argument cannot be allowed to focus simply on the effects of a determination on OHIP; rather, it must focus on the wide range of government policies that relate to spousal entitlements. The profound policy impact of judicial decision-making under the Charter can no longer be doubted.

The role of the attorney general: The policy context

If you read the academic and scholarly texts and monographs dealing with the office of the attorney general, you will conclude that he spends most of his time supervising the prosecution of criminal or civil litigation. That is the conventional understanding. But it has not been my

experience. Probably no more than 15 per cent of my time is spent dealing with cases. But an attorney plays a much larger role in government, a role that has so far been largely ignored by scholars and the press. That role has to do with the attorney general's participation in the policy-making process of government.

It is my thesis that an independent attorney general should bring to policy-making in government a particular concern for principle, for constitutionalism, and for rights. The attorney general has a mandate in government apart from his prosecutorial role – a mandate to ensure adequate attention to issues of principle.

Those who have studied jurisprudence will be familiar with the writings of the American scholar Ronald Dworkin. Dworkin claims that there is a dichotomy between the judicial process on the one hand and the legislative process on the other. He argues that the special function of judicial review is to focus on issues of principle – decisions about what rights people have under our constitutional system, rather than decisions about how the general welfare is best promoted. Because for Dworkin the dichotomy is real, not academic or imagined, he asserts that the political process, when left to its own devices, pays inadequate attention to the fundamental issue of principle. Here, for example, is how he describes judicial review. 'We have an institution that calls some issues from the battleground of power politics' [where he thinks I work] to the forum of principle [where he thinks the judges work]. That institution holds out the promise that the deepest most fundamental conflicts between individual and society will once, some place [never where I work, just where the judges work] finally, become questions of justice.' 'I do not call that religion or prophecy,' he says, 'I call it law.'

I believe that it is the function of an independent attorney general to bring the focus of justice to questions of politics. There is (and no one would deny it) the judicial review role that Dworkin has assigned to the court. But I believe it is wrong to imply that issues of principle cannot also be a primary concern of persons in the political process. Indeed, my claim is that an attorney general's special responsibility must be to ensure that issues of principle remain a central concern in policy-making. An attorney's role, in other words, is precisely to ensure that democratic decision-making in our community takes into account questions of human rights and constitutionalism.

Let us take the issues that *Morgentaler* presents. Dworkin, more than once in his various texts, offers what he calls a 'chequer-board' analogy for the process by which the vexing political and judicial issue of abortion might be determined.² He says that politicians might pass a law that

2 See R. Dworkin *Law's Empire* (Cambridge: Harvard University Press 1986) 178–83.

permits abortions to be performed on Monday, Wednesday, and Friday but not on Tuesday, Thursday, or Saturday. He asserts that this 'chequer-board' response is a typically democratic, political solution to the problem. It is political and democratic because it meets the needs of one competing pressure group in some way, but does not totally offend the interests of the other.

Dworkin claims the court's role is to take that 'chequer-board' answer to a social problem, thrown up by the legislature and test it against considerations of principle. He suggests that no principled person would respond to the social problem of abortion by the 'chequer-board' rule and that courts would and should reject it. Courts apply principle to politics. But (*Morgentaler* notwithstanding) it is not the courts alone who should object to a 'chequer-board' solution. It is also the special responsibility of an independent attorney general to object to unprincipled solutions to issues of fundamental human rights. And so it seems to me that an attorney general has an obligation within the political process to attempt to ensure that unprincipled solutions, of which the 'chequer-board' approach is an example, are not adopted by government. I suggest that the contrast Dworkin seeks to emphasize between the judicial and the political process is neither as sharp nor as striking as he claims. An attorney general should bring to political deliberations the same considerations of principle that feature so prominently in the judicial forum with which lawyers are more familiar.

Consider *Morgentaler* again. The case has been decided and the relevant provision of the Criminal Code has been excised by the court; but the political and social dilemmas remain. We now have the problem of providing health care services that are consistent not only with the direct requirements of the case but, if you are an independent attorney general, consistent with the implications of the court's reasoning. For the judges did not write all those pages simply to decriminalize one activity. They surely wrote to convey a message, discreetly and subtly, of course, as they always do, about the way our community should look at these complex issues. And I believe that a principled attorney general must look at the decision and its legal consequences for health services in the light of the underlying principles of the case. It would be easy for a minister of the Crown (and it has happened in some places) to respond to the judgment by taking the position of one constituency or the other. An attorney general, in my respectful view, does not have that liberty. He must attempt to assure that the reaction of his colleagues in other ministries is a principled response that does full justice to the interests of citizens that were referred to by the court, and to the implications and the deeper message of the decision itself.

Let us take the rather different example of free trade. Almost all debate

in this country has centred on the economics of free trade with the United States – whether it will create more jobs, whether it will improve our competitive economic edge, and similar questions. I believe that the attorney general's role as a member of government may require him to direct his attention not to economic concerns (which remain important) but to the larger constitutional implications presented by the issue of free trade and the proposed solutions. These include not only the issue of provincial legislative power and free trade, but also the impact of free trade on the jurisdiction of the federal government and on individual rights. In our ministry we have been preparing a constitutional audit at the level of principle to determine the impact of a free trade agreement on federalism, our constitutional system, and the strategy of co-operative federalism by which this country has been governed so successfully for so long.

Let us take another example.—the section 33 'override' in the Charter of Rights. Ministers in our government are no different from those in any other government: they attempt vigorously to represent and advance the concerns of the constituencies that they have been assigned by the premier. The minister of health is daily concerned about how health services can be most effectively provided. The minister of consumer and commercial affairs spends much time thinking about how consumerism can be made a real factor in the market-place. The minister of industry and trade spends the day thinking about how Ontario's gross provincial product can be increased. And often, when a constitutional decision gets in the way of some policy which is perfectly sensible to the minister, the suggestion is made by the constituency served by the policy that the legislature should use its Charter right to override that law – in the interests of consumers, in the interests of people who need health care, in the interests of a healthier market-place. There have been examples in the country where the override has been utilized in this way, and there will be more. I believe that an independent attorney general has a special role regardless of the policy field in which that issue is presented. The attorney's responsibility is to attempt to move government to a principled response to the problems that section 33 presents.

My larger point can be summarized in this way. Ontario in the late 1980s has become a diverse and pluralistic society in which the consensus, the set of common or shared values that characterized Ontario life in the 1950s, has largely disappeared. The politics of consensus has been replaced by the politics of individual or group rights. It is the role of an attorney general to ensure that there is adequate attention paid within the policy-making process to considerations of principle and to the question of the impact of government action on human rights. It is the responsibility

of the attorney general to direct government away from 'chequer-board' solutions and in the direction of principled ones.

The role of the attorney general: The litigation context

The academic and popular writing on the office of attorney general has focused on the attorney general's responsibility in litigation. This is not surprising. The public role of the office is, of course, carried forward in criminal and civil litigation. That is where the public sees an attorney general, that is where the public expects him or her to perform; and by and large that is where an attorney general is judged by the public to have succeeded or failed. The conventional view is that the performance of the attorney general is judged by the role he or she plays in criminal or civil litigation. And although that role occupies a small proportion of my working day, I recognize that reality.

The fact, of course, is that for the most part judgments in criminal prosecution and civil litigation matters are made by a large number of men and women, the crown attorney's staff. Most of the decisions that are made about prosecutions and the conduct of civil or criminal trials are made by my agents. I do not hesitate to say, having gone from one end of the province to the other to meet them, that they represent the most dedicated and talented collection of professionals that I have worked with in my law career. I, of course, bear political responsibility for the decisions taken and must answer for them; but for the most part, those decisions are made on a day-to-day basis by others.

Some observations should be made as we examine the role of attorney general in criminal prosecution. We try to keep in mind certain principles as we operate in the litigation context. First, there is the principle of independence from political considerations. Second, there is the importance of assessing what the law, including the Charter of Rights, requires in an individual case. Third, there is the determination of what the public interest requires. I include under this head a consideration of what may be required to maintain confidence in the administration of justice itself.

There are also a number of points to remember about the relationship of the attorney general to his colleagues in a federal system of government, to the police, to the Cabinet in criminal matters, and to the courts. Let me turn to these issues *seriatim*.

Federalism and the attorney general

The Criminal Code, which the attorney general and his agents enforce, is a federal statute enacted by Parliament and devised by the Ministry of

Justice in Ottawa. In prosecuting a criminal case it is fundamental to remember that we are not prosecuting a law that we have made or a law for which we have legislative responsibility. That observation does not answer all the questions (or perhaps even many of them) about how we are to react to federal law, but it does distinguish our criminal prosecution role from our role on the civil side, and places it in a special context. Historically, the role of the provincial Crown Law Office towards Criminal Code amendments and other federal criminal law enactments has been essentially reactive. The federal government proposes an amendment, whether it be in the area of pornography or abortion, and thereby makes a value judgment about what kind of amendment or legislative enactment will receive the approval of the governing party in Ottawa and pass muster in the House of Commons. Then, having made that critical policy judgment, the federal government communicates its proposal to my colleagues across the country for reaction. We look at the proposals that are made and, because we administer the system and are responsible for getting convictions where appropriate, we provide, I think, fairly useful comment to the attorney general of Canada about the practical implications in the courtroom of this or that proposal. We also provide policy advice of a more general or fundamental type. None the less, after the broad policy decisions have been made in Ottawa, the provinces' role has been reactive; and, of course, there have been some instances in which Criminal Code or other amendments have been made without any consultation with the provinces.

This process is beginning to change. There is a desire, in Ontario as well as in the other provinces, to play a creative and meaningful role in the development of criminal law. The provinces, which have the responsibility of prosecuting almost all criminal offences and bear the constitutional and financial burden for the administration of justice, should not only be heard in relation to federal proposals but should not hesitate, when views are strongly held, to take the lead. In a practical courtroom sense, and, I believe, in a social sense, we are closer to our communities in a nation as diverse as Canada. No other group of individuals, nor any other group of professionals, has a more useful contribution to make here than the Crown attorneys of Ontario. I hope we will begin to see a shift in our operations and our attitudes so that our staff in Ontario, through me, will develop initiatives that are designed to encourage the federal government to take what we regard to be the correct legislative step. A passive role is, in my judgment, not conducive to solving the problems we face in this decade. Nor is it practically desirable, since the province bears a financial obligation for the administration of justice, to allow our priorities to be dedicated exclusively by federal initiatives.

The attorney general and the police

The English conception of the attorney general as the principal prosecutor of criminal cases leads to a profound and principled separation from the operation of the police. This view has not been widely accepted in Canada. In Ottawa, for example, until very recently the RCMP reported to the attorney general of Canada. In most provinces the provincial police or the local police boards report to and take-direction from the attorney general. In the United Kingdom a different view has been taken, and the Home Office has a role that is quite distinct from that of the attorney general. That model has been followed in Ontario. I think it is the right model. The police do the investigating; the police have the same right as any citizen to appear before a justice of the peace to swear an information that they have reasonable and probable grounds to believe and do believe that the offence has been committed, and to invite the justice of the peace to accept or reject that information.

In many other provinces the attorney general plays a role in the process that amounts, in certain cases, either to directing the police to swear the information and get the process started, or to directing them to stop it. That has not been the tradition in Ontario and I think our practice is a sound model of separation. It does, however, create some day-to-day difficulties.

Situations inevitably arise that require the attorney general to make a decision – to initiate or to stay a prosecution – which is at odds with the conduct or views of the police. The responsibility of the attorney general in these matters overrides any concern he may have about placing a few thorns in the side of the normally harmonious relationship between the police and the Crown prosecutors. In such cases, the public is made aware (sometimes to its surprise) that in our system of justice, the attorney general is neither responsible for nor the handmaiden of the police.

Two recent examples are noteworthy. Subsequent to the Ontario Court of Appeal's decision overturning the acquittal of the accused in *R. v. Morgentaler*,³ and while the case was pending on appeal before the Supreme Court of Canada (but before the oral argument had commenced), the Toronto police again charged Dr Morgentaler and his associates with the same offence. There is no doubt that they had reasonable and probable grounds to believe that an offence against the Criminal Code was being committed. But, as has been emphasized, this is clearly not the only decision to be made in deciding whether to proceed to trial. The High Court of Justice in Ontario has held that it would not

3 *R. v. Morgentaler, Smoling and Scott* (1986) 22 CCC (3d) 353; (1985) 52 OR (2d) 353 (Ont. CA)

proceed with any further trial of the accused while their appeal was pending before the Supreme Court of Canada.⁴ Given that the facts supporting the charge, and presumably the defence raised, would be virtually identical to the charge upon which the accused were tried and acquitted, it was, in my opinion, in the interests of justice that any further allegations of criminal activity be held in abeyance until the highest court authoritatively ruled on the legality of the impugned conduct. With these factors in mind, the charges laid were immediately stayed.

This example clearly demonstrates the differences in the roles of the attorney general and the police. Before laying the charges, the police consulted the attorney general and his agents, and were advised that any charges that were laid would, in the circumstances, be stayed. Notwithstanding this advice, the police concluded that it was their duty and responsibility to lay the charges that they believed on reasonable and probable grounds were warranted. The attorney general, while acknowledging the role of the police that entitled them to take this action, did what he believed the administration of justice required. To some observers it may have appeared that the right hand did not know what the left was doing. In my view, that difficulty does not offset the importance of the principle of separation.

The second case, which contrasts with *Morgentaler*, occurred recently in northern Ontario.⁵ Four miners were killed as a result of an accident in a mine shaft. The Sudbury Regional Police commenced an investigation; eventually, they charged another miner with four counts of criminal negligence causing death. It was clear that the police, by swearing the required information before a justice of the peace, had come to the conclusion that there were reasonable and probable grounds to believe that a criminal offence had been committed; the justice, upon hearing sworn testimony to this effect, agreed that the legal test had been met. As a result of the charges, a coroner's inquest, which would otherwise have been convened, was adjourned. (It is the practice in this province not to hold a coroner's inquest when criminal charges have been laid.)

The attorney general was asked in the legislature to consider exercising his power to stay the criminal proceedings so that the coroner's inquest could proceed. It was vigorously asserted that an inquest was a routine process in northern mining deaths, that it would be a useful investigative tool to prevent other accidents, and that public anxiety about mining safety could be satisfied only in this way. The issues I had to consider were

⁴ *Campbell v. Attorney General of Ontario* (1987) 60 OR (2d) 617 (Ont. CA)

⁵ *R. v. Joe Kuhle*. Kuhle was charged on 6 May 1987. (The incident occurred on 14 April 1987.) He was acquitted of all four counts after a trial in the Provincial Court (Criminal Division) on 8 February 1988.

(1) whether the legal test was met (that is, were there reasonable and probable grounds), and (2) if the legal test was met, whether there were any other legitimate factors that militated against our continuing with the prosecution.

Upon serious consideration of the investigation and the evidence obtained, it could not be categorically stated that the legal test was not met. Were there non-legal factors which suggested that the charges should be stayed? The importance of the public interest in determining the cause of death (which is normally satisfied by the coroner's inquiry) must be balanced against the accused's right to a fair trial.

It probably would have been appropriate to hold the coroner's inquest before any decision had been made with respect to the laying of criminal charges. However, criminal charges having been laid, it was not in the interest of justice to stay those charges for the purpose of conducting the inquest. The overriding concern must be the risk of prejudice to the accused, and this risk would have been substantial if an inquest had been held. Moreover, there was no reason an inquest could not be held after the criminal charges were dealt with. This delay might inconvenience the public's right to know, but the accused's right to a fair trial must take precedence over the public's inconvenience. In the light of these factors, I decided not to stay the criminal charges.

The attorney general and the Cabinet

As the King's Attorney, the attorney general was responsible for representing the sovereign's interest in the court; this responsibility was most critical in the area of criminal law. In addition to prosecuting all the important criminal cases, the attorney had the responsibility of deciding whether or not to continue prosecutions initiated by private citizens. This responsibility remains in the hands of the various attorneys general for the provinces in Canada, by virtue of the combination of section 92(14) of the Constitution Act, 1867, and the equivalent sections of the Ministry of the Attorney General Act. The relationship between this quasi-judicial function and the attorney general's status as a member of the government and Cabinet raises a number of issues.

It is an established principle that in determining whether or not to prosecute, or whether to stay a prosecution already launched, the attorney general must be guided solely by considerations that are independent of his affiliation with a political party or the government. His decision must be based on his best assessment of what the law and the public confidence in it require. This necessarily follows from his role as the chief law officer of the state where that state policy is based on the rule

of law. The confidence of the public in the administration of justice prohibits the use of the criminal law for partisan purposes. Moreover, as a guardian of the public interest, the attorney general must act in accordance with the interests of those whom the government represents, and not simply in the interest of the government to which he belongs.

So stated, this principle of independence appears to be uncontroversial, but it was not always so. Although the principle had its adherents as early as the seventeenth century, it is well documented that, at least until 1924, many decisions to prosecute or to stay prosecutions were the direct result of instructions from the Cabinet. It was not until the *Campbell* case in England in 1924 that the relationship between the attorney general and the Cabinet was widely debated, with fatal consequences for the government of the day.⁶ Since that time, well-articulated principles have been established both in England and in Canada to delineate the proper role of the attorney general in deciding questions relating to criminal prosecutions.

These principles prescribe that the attorney general must initially assess the case from a purely legal perspective – that is, he must consider the evidence available and the applicable law to determine whether or not an offence has been committed, and whether or not a case can be made out. This is the threshold requirement. Clearly, an attorney general cannot countenance criminal proceedings on the basis of insufficient evidence. Similarly, he is obliged to prevent a private prosecution when there is insufficient evidence to establish the offence in law.

Even when the attorney determines that a case can be made, he must also consider whether it is in the public interest to prosecute. The considerations involved in this inquiry have been stated by Lord Shawcross, then the attorney general of England.

The true doctrine is that it is the duty of the Attorney General, in deciding whether or not to authorize the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other consideration affecting public policy. In order to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the government and indeed, as Lord Simon once said, he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations which might affect his own decision, and does not consist, and must not consist, in telling him what that decision ought to be. The responsibility for the eventual decision rests with the

⁶ See the discussion of this incident by J.L.J. Edwards in *The Law Officers of the Crown* (London: Sweet and Maxwell 1964) chapters 10 and 11, and in *The Attorney General, Politics and the Public Interest* (London: Sweet and Maxwell 1984) 310–18.

Attorney General, and he is not to be put, and is not put, under pressure by his colleagues in the matter.⁷

In this way, in reviewing the appropriate considerations before making his decision, the attorney general must consider more than purely legal factors. The decision to prosecute – an exercise of executive power – also entails what must be called a ‘political’ dimension with respect to the application of the law and may, in some cases, have important social repercussions that must be reviewed in order to fulfil the attorney general’s role as the protector of the public interest.

Once it is acknowledged that the public interest is not always furthered by prosecuting whenever the evidence suggests that a case can be made out, difficult problems arise. Some of the attorney general’s colleagues in the Cabinet may, as a consequence of their ministerial responsibilities, have information regarding the social ramifications of a given prosecution as well as a keen interest in those ramifications. It is appropriate for the attorney general to consult with those colleagues in order to be fully informed of these factors. However, the principle of independence dictates that his decision must not take account of concerns about the effect of such decisions on the future of the government of the day, or of any individuals in the Cabinet. As was stated by the Honourable Ron Basford in the House of Commons when he was the attorney general of Canada, ‘The first principle, in my view, is that there must be excluded any consideration based upon narrow, partisan views, or based upon the political consequences to me or to others. In arriving at a decision on such a sensitive issue as this, the Attorney General is entitled to seek information and advice from others but in no way is he directed by his colleagues in the government or by Parliament itself.’⁸

It has been argued that this distinction between ‘party political’ considerations and ‘socio-political’ considerations is not tenable. Although strict party-political considerations (in the sense of the fate of the government) can be removed from the decision, the basis upon which non-party-political considerations will be made will inevitably be influenced by the general outlook of the party in question. That is, differing parties will have differing views of the significance of the social repercussions. Thus, as a member of a political party, the attorney general, in considering the social repercussions as set out by his colleagues, is necessarily taking a partisan view. Even accepting the attorney general’s ability to ignore purely party-political considerations, the distinction is based on an unrealistic view of politics.

7 Great Britain, House of Commons, *Debates* vol. 483 cols. 683–684, 20 January 1951

8 Canada, House of Commons, *Debates* vol. 121, 3882, 17 March 1978

This observation does not negate the importance of maintaining the independence of the attorney general. There are two aspects of this independent role: First, the existence of the principle of independence as an established constitutional principle; second, a tradition of respect for the principle by the attorney general and the Cabinet of the day. It is understood in our province that the attorney general is first and foremost the chief law officer of the Crown, and that the powers and duties of that office take precedence over any others that may derive from his additional role as minister of justice and member of Cabinet. Of course, this is not to say that the attorney general must be a member of the Cabinet; it is only to deny that our tradition necessarily thrusts the office-holder into two incompatible positions. In the end, the difficulty may simply be that of *demonstrating* the independence of the attorney general's decisions — a matter as much of appearance as of substance.

The attorney general and the courts

The role of the court in reviewing determinations made by an attorney general in the conduct of criminal prosecutions in the province may have taken a new turn under the Charter. Prior to the Charter, the attorney general's powers in regard to the initiation or staying of criminal (or for that matter civil) proceedings was said to be beyond the scope of judicial review.⁹ The courts would not interfere with the attorney general's powers under the Criminal Code to prefer indictments (section 507)¹⁰ or to stay proceedings (section 498),¹¹ maintaining that the proper forum for review was the legislature.

The Supreme Court of Canada decision in *Operation Dismantle Inc. et al. v. The Queen* may be invoked in future in support of reduced deference.¹² In that case the court held that Cabinet decisions made by the attorney general in accordance with a discretion provided by law are subject to Charter review. Not surprisingly, in cases that have been argued since *Operation Dismantle*, the courts have expressed a reluctance to interfere

9 The early authorities which established this position are *Ex p. Newton* (1855) 4 El. & Bl 869; *The Queen on the Prosecution of Gregory v. Allen* (1862) 1 B. & S. 850; *The Queen on the Prosecution of Tomlinson v. Comptroller-General of Patents, Designs and Trade Marks* [1899] 1 QC 909. More recently, this position was affirmed by the House of Lords in *Gouriet v. Union of Post Office Workers* [1978] AC 435. The leading Canadian case is *R. v. Smyth* (1971) 3 CCC (2d) 366 (SCC).

10 *Re Saikaly and The Queen* (1979) 48 CCC (2d) 192 (Ont. CA); *Re Balderstone and the Queen* (1938) 8 CCC (3d) 532 (Man. CA)

11 *R. v. Beaudry* [1967] 1 CCC 272 (BCCA); *Re Panarctic Oils and The Queen* (1983) 69 CCC (2d) 393 (NWTSC)

12 [1985] 1 SCR 441

with an exercise of discretion unless it involves a 'flagrant impropriety.'¹³ No doubt the courts are aware, notwithstanding their Charter powers, of the danger of second-guessing complex decisions of law and policy that members of government are obliged to make in the exercise of their constitutional or statutory responsibilities.

This raises a related issue – the power of the court, on a motion by an accused person, to stay proceedings when they constitute an abuse of process. Until the recent Supreme Court of Canada decision in *R. v. Jewitt*,¹⁴ the abuse of process doctrine was in a state of uncertainty. The courts were generally reluctant to stay proceedings initiated by the attorney general, on the ground that such a decision is not properly the subject of judicial review. In *Jewitt*, the court held that there does exist a residual discretion in the court to protect its process from abuse. The judgment indicates that the court cannot simply abdicate its responsibility and rely upon the executive always to act fairly in regard to prosecutions. The court also affirmed that its discretion would be exercised only in the clearest cases.

The attorney general and the 'unconstitutional law'

What is the obligation of an attorney general confronted with an unconstitutional law or unconstitutional evidence? Let us return to *Morgentaler*. A number of good lawyers formed the opinion that the section in the Criminal Code under which the accused was charged was unconstitutional. There will be many cases where an even stronger case can be made for unconstitutionality. What happens when the attorney general or his law staff form an opinion that the federal law under which it prosecutes is unconstitutional, or is likely on the balance of probabilities to be found unconstitutional?

I have not yet formed a clear view based on principle about this issue. But I think as the Charter cases unfold, we will get a fuller understanding of what the attorney's role ought to be. I would emphasize, however, that in the criminal context the law we are prosecuting is not our law. It is devised as a result of policy determinations made by others. The attorney general of Canada, whose role in federal legislation is comparable to my own in provincial legislation, would have made the determination that the

¹³ The phrase comes from *Re Balderstone* supra note 10. On the issue of preferring indictments see *R. v. Moore* (1986) 26 CCC (3d) 474 (Man. CA); *Re Regina and Arviv* (1985) 19 CCC (3d) 395 (Ont. CA), leave to appeal to SCC refused. On staying proceedings see *Campbell v. AG Ont.* (1987) 58 OR (2d) 209 (Ont. HCJ), aff'd on appeal (1987) 60 OR (2d) 617 (Ont. CA), leave to appeal to SCC refused.

¹⁴ (1985) 21 CCC (3d) 7

law was constitutional. I believe in such circumstances it is appropriate for a provincial attorney to pay a significant degree of deference to that determination.

It is also important to remember that in Charter questions, especially on the criminal side, it is desirable that the critical determinations be made not by law officers of the Crown, no matter how well-intentioned or how brilliant, or indeed how often correct, but rather by the judges. I think the confidence in the operation of our system which is crucial to its survival is best obtained if, on critical matters of criminal law, determinations about constitutionality are made by judges who are likely, by virtue of their independence, to have the trust of our fellow citizens.

I am not certain whether the attorney general of Ontario, in defending a law, is necessarily the best person to advance its policy justification under section 1 of the Charter. Indeed, I would consider it proper, especially if I believed that a law was unconstitutional, to invoke a process so that the attorney general of Canada could argue justification under section 1. He is the actor best qualified, in constitutional and actual terms, to rationalize the action taken by the Parliament of Canada. This points once again to the importance of constitutional adjudication by a court in criminal matters.

Now let me turn very briefly to civil litigation. The nature of civil litigation, of course, has changed radically as a result of the Charter. We still defend the government when it is sued because, for example, it has bought a hundred canvas tents and has refused to pay for them; we still defend the government when it is attacked on major federalism questions. But when we look at the work-load of the department on the civil side, we see that constitutionalism and charter rights are inevitably at stake. The statistics verify this view. Four years ago we received fourteen notices in one year that the constitutionality of a statute would be challenged; last year we received well in excess of seven hundred. Increasingly, civil litigation is being affected, if not driven, by the Charter and Charter considerations.

The obligation of the Attorney General, of course, is to conduct and regulate all civil litigation for and against the Crown. In general, I think it is reasonable to conclude that an attorney general, if he advises the government that the provincial law is unconstitutional, is free to indicate, with Cabinet concurrence, that he will amend the legislation in the face of a challenge or settle the lawsuit on the basis that the law is unconstitutional. Very early in my career as attorney general a young woman who wanted to play on a boys' hockey team said that she believed the section of the Ontario Human Rights Code which prohibited complaints of sex discrimination in sports was unconstitutional and should not bar a

complaint that she wished to make to the commission.¹⁵ She alleged that there had been discrimination in the league's refusal to permit her to try out for the neighbourhood hockey team made up entirely of boys. We reviewed the matter carefully, and we came to the conclusion that she was right and the provision of the Human Rights Code was unconstitutional and in breach of her Charter rights. We told her that that was our view, and said that we would ask the legislature to repeal the section. But repealing a section in the legislative process, even one that has to do with sex discrimination, takes a good deal of time. She couldn't wait. She commenced proceedings notwithstanding our undertaking to repeal the offending section. We joined with her in court, and the attorney general of Ontario made the submission that the section was unconstitutional. The court did not agree; Mr Justice Steele said that not only was Justine Blainey wrong but, more embarrassing for me, the attorney general of Ontario was wrong – the section was constitutional. Happily, Justine Blainey decided to appeal the case to the Court of Appeal, and we were both vindicated.¹⁶

The applicants in *Paul and Wright v. The Minister of Consumer and Commercial Relations*,¹⁷ both students at the University of Toronto Law School, challenged the constitutional validity of a section of the Vital Statistics Act which prevented a married woman from giving her child her own surname. The section required the child to be given the surname of the father. I had already introduced in the legislature an amendment to the Vital Statistics Act to permit the parents to agree to give a child either parent's surname or, failing agreement, the mother's surname. But, as is often the case, the amendment took its slow course in the legislative process, and the two students went to court. The attorney general appeared (acting for the minister of consumer and commercial relations, who was the custodian of the statute) and conceded that the provision was unconstitutional. We had more luck this time, and the judge of first instance agreed with us.

In both of these cases the Cabinet accepted the advice of the attorney general that the sections were unconstitutional, and told us to prepare the appropriate amendments and to concede the issue. We were permitted to take a very different view of our power in a civil case than we feel we are entitled to take in a criminal case under a federal statute.

The question arises of the proper role of the attorney in a case where the Cabinet refuses to take his or her advice that a legislative provision is

15 *Re Blainey and Ontario Hockey Association et al.* (1985) 52 OR (2d) 225 (Ont. HCJ)

16 *Re Blainey and Ontario Hockey Association et al.* (1986) 54 OR (2d) 513; application for leave to appeal to SCC dismissed (1987) 58 OR (2d) 274

17 Unreported decision of the Ontario High Court of Justice, 9 December 1985

unconstitutional. There may be great pressure on a Cabinet to reject an attorney's civil advice. When I announced the way in which we would proceed in Justine Blainey's case, I thought that the editorial writers, the newspaper reporters, and other politicians would say, 'Well, this Scott is terrific, he is standing for constitutional values in the Charter against restrictive legislative enactments.' In fact, most of them said that I was trying to ruin boys' hockey. Politicians are very susceptible to that kind of analysis of motive. There is every chance that an attorney general may face the fact that the Cabinet will not accept advice to concede the unconstitutionality of a civil enactment.

Professor J.L.J. Edwards has dealt with this issue in his scholarly texts and papers.¹⁸ In such a case the door will be left open, he says, for the extraordinary demonstration of the attorney general's independent status. (I think that what he really means by that is he would feel better about things if I quit.) I am fortunate to be able to say that this is an issue I have yet to confront. In the practical world, it is the proper business of attorneys general to take steps to cut down the risks of confrontations that cannot be resolved. Timely advice to our government colleagues, assistance in the development, in government and elsewhere, of a consciousness of the values that inform our constitution, and the provision of quality lawyering services to government will all enhance compliance and minimize conflict. Moreover (and still in the practical world), I am persuaded that in the present stage of development of our Charter there are many cases in which the attorney general will best secure justice according to law by seeing to it that the issues are fully aired before the courts, which are charged with the constitutional responsibility for interpreting and applying our fundamental law. This approach, I believe, is fully in accordance with the tradition of independence and impartiality which makes the office of the attorney general one of such enduring value and importance in our society.

¹⁸ J.L.J. Edwards 'The Attorney General and the Charter of Rights' in R. Sharpe (ed.) *Charter Litigation* (Toronto: Butterworths 1987) 45-68, at 52-3

Law Reform Commission
of Canada

Working Paper 62

CONTROLLING CRIMINAL
PROSECUTIONS:
THE ATTORNEY GENERAL AND THE
CROWN PROSECUTOR

1990

Commission

Mr. Justice Allen M. Linden, President
Mr. Gilles Létourneau, Vice-President
Mr. John Frecker, Commissioner
Her Honour Judge Michèle Rivet, Commissioner

Secretary

François Handfield, *B.A., LL.L.*

Co-ordinator, Criminal Procedure

Stanley A. Cohen, *B.A., LL.B., LL.M.*

Consultants

Marc Rosenberg, *LL.B.*
C. Jane Arnup, *LL.B.*
Stephen G. Coughlan, *B.A., M.A., LL.B., Ph.D.*

Special Adviser

Professor J.L1.J. Edwards, *LL.D.*

CHAPTER ONE

The Role of the Attorney General

I. Introduction

The federal and provincial Attorneys General personify the public prosecution system in Canada. These officials are accountable to the public, through Parliament and the provincial legislatures, for the exercise of powers conferred by statute and common law. They lie at the centre of the justice system. The prosecution by the Crown of offences under the *Criminal Code*¹ or other federal and provincial legislation is carried out by agents of the Attorneys General. Superintendence over such public prosecutions, as well as the ability to control private prosecutions, rest with the Attorneys General. Further, Attorneys General have historically, though currently to a diminished extent, been responsible for the police and correctional facilities.

Equally central to the federal justice system is the Minister of Justice. As a member of Cabinet, the minister has political responsibilities. Federally, the Minister of Justice bears primary responsibility for formulating the legal policy of the government of the day, is responsible for the court system and the administration of justice generally, and is legal adviser to the Cabinet.

In light of the important functions of each of these offices separately, it is particularly noteworthy that in Canada they are combined into one. Federally, a Minister of Justice is created by statute, and the office-holder is *ex officio* the Attorney General of Canada. In addition, each province has a single office-holder who performs the functions associated with both posts. In some provinces the office-holder is known as the Attorney General, and in others as the Minister of Justice. For convenience, we will use the term "Attorney General" to refer to the holder of this combined office, unless the context requires otherwise.

The importance of having a responsible person of integrity in the role of Attorney General is apparent. In particular, the running of the prosecution service is a task with a great potential for conflict of interest. Situations have arisen on many recent occasions — the

1. R.S.C. 1985, c. C-46.

Donald Marshall inquiry,² the Manitoba "Ticketgate" inquiry,³ the resignation of British Columbia's Attorney General⁴ and the Patricia Starr inquiry⁵ — in which the need to have someone act independently and free of political pressure or other conflicts has been made apparent.

This paper will examine the role, responsibilities, and powers of the merged office of Attorney General and Minister of Justice at the federal level. Our recommendations will concern two major areas: the administrative structure of the combined office of the Department of Justice and the office of the Attorney General, and the particular powers of the Crown prosecutor, acting under the Attorney General, to initiate, conduct, and terminate proceedings. The recommendations we will make for restructuring are directed specifically at the federal Department of Justice; however, we believe that the proposals would be equally appropriate to both the federal and provincial levels of government. The recommendations concerning the powers of the Attorney General and Crown prosecutors with relation to criminal prosecutions will directly affect the provinces.

II. Historical Sketch

Both provincial and federal legislation creating the office of Attorney General began by conferring upon the office-holder the powers and duties which have traditionally belonged to the Attorney General of England and Wales. As a result, the starting point for

-
2. The inquiry was established in Nova Scotia to investigate the wrongful murder conviction of Donald Marshall. See the Royal Commission on the Donald Marshall, Jr., Prosecution, [Report] 7 vols. (Halifax: The Royal Commission, 1989). In the course of hearings, testimony raised the question of the proper relationship between the police and the Attorney General's office with regard to responsibility for deciding to lay criminal charges, possibly affecting the decision not to lay charges against a member of the provincial Cabinet.
 3. A police investigation led to charges of ticket-fixing against a number of lawyers, and several judges, in Manitoba. The office of the Attorney General prosecuted the charges, but was also involved, through its administration of justice responsibility, in negotiations with judges concerning salary, retirement, etc. See *The Dewar Review: A Report Prepared by The Honourable A.S. Dewar at the request of the Attorney-General of Manitoba*, October 1988 [unpublished] [hereinafter *Dewar Review*]. One official in particular was found to have been in a clear conflict of interest in both engaging in plea-bargaining discussions with counsel for one of the judges, and participating in the process determining that judge's pension entitlement. See the discussion of this issue below at 35 in "Dividing the Offices of Minister of Justice and Attorney General".
 4. Early in 1988, Brian Smith, the Attorney General of British Columbia, resigned his post. His stated reason for doing so was attempted interference from the Cabinet in what should be an independent prosecutorial responsibility for determining whether charges should be laid.
 5. A judicial inquiry was established in Ontario to investigate a number of allegedly improper political contributions. The Attorney General of Ontario, Ian Scott, noted that it might be necessary for him or the Crown law office to advise investigating police officers whether charges should be laid. As a result, Scott felt that he ought not simultaneously to be acting as legal adviser to the government, and outside counsel was hired.

understanding the present offices is the history of the Attorney General of England and Wales.⁶

In earliest times the "King's Attorney", or Attorney General, was merely the barrister entrusted with supervision of the King's legal interests throughout the country. The "King's Solicitor", the precursor to the Solicitor General, was the Attorney General's senior deputy.⁷ During the sixteenth century most prosecutions were in the hands of private individuals, but the Crown, through its personal representative, on occasion instituted and conducted proceedings. Since most prosecutions were nominally in the name of the Sovereign, the Crown had the right, through its representative, to terminate the proceedings prior to completion.⁸ These powers of intervention thus came to be exercised by the Attorney General or by the Solicitor General. The latter acted, for many purposes, as the deputy to the Attorney General, and undertook much of the counsel work.

The two most important powers of the Attorney General in England and Wales were the right to initiate and terminate prosecutions. The Attorney General could initiate prosecutions by laying an information before a justice and seeking the issuance of process, or by the use of an *ex officio* information,⁹ which could only be used for misdemeanours¹⁰ and which removed the case into the Star Chamber, a court with wide discretionary powers in criminal matters. After the Star Chamber was abolished, the Attorney General was able to place the information directly into the Court of King's Bench, and also had a right to move

6. Philip Stenning has conducted a detailed study of the historical roots of the public prosecution system under the auspices of the Law Reform Commission of Canada [hereinafter LRC]: *Appearing for the Crown* (Cowansville, Quebec: Brown, 1986). Only certain aspects of his research are recounted here.

7. *Ibid.* at 15-16.

8. *Ibid.* at 17.

9. D. Walker, ed., *The Oxford Companion to Law* (Oxford: Clarendon, 1980) defines *ex officio* information as follows at 444:

A criminal information filed by the Attorney-General on behalf of the Crown in respect of crimes affecting the government or peace and good order of the country. It was utilized in cases of seditious writings or speeches, seditious riots, libels on foreign ambassadors, and the obstruction of public officers in the course of their duties. It was abolished in 1967.

10. Walker, *ibid.*, defines misdemeanour as follows at 843:

At common law in England, a crime which was neither a treason nor a felony (qq.v.) but a lesser offence. Some crimes which were technically misdemeanours were serious, e.g. conspiracy, riot, assault, but many were trivial offences. In 1967, all distinctions between felony and misdemeanour were abolished, the rules applicable to misdemeanour being made applicable to both categories. The distinction has been replaced by that between arrestable and non-arrestable offences, the former being those for which the sentence is fixed by law or for which a person may be sentenced to five years' imprisonment.

indictments directly to that court. The Attorney General also had the power to terminate any private prosecution (except an "appeal of felony"¹¹).

The Attorney General of England and Wales was, and continues to be, the head of the bar, and retains the right to be heard before all other counsel when appearing personally before any court. Any prosecution for a felony could be stopped by the Attorney General's personal use of a *nolle prosequi*.¹² The Attorney General could take over and conduct private prosecutions with the consent of the private prosecutor, though whether the ability existed to do so without that consent is unclear.¹³

In the English colonies that were established in the Maritimes and Upper Canada, this British system was largely adopted, but with some modifications. In each of these colonies and in Lower Canada, the English office of Attorney General was established. Particularly of note, however, is the greater involvement of these Attorneys General in prosecutions that, in England, would generally have been pursued privately.¹⁴ In Upper Canada for example, the first Act creating a system of Crown Attorneys came more than 20 years before the

11. Walker defines appeal of felony as follows (*ibid.* at 69):

In case of death by murder or manslaughter the feudal lord of the deceased, the widow, or the heir male might bring an appeal, in substance an accusation or challenge or claim for loss to himself rather than for harm to the public. An appeal might be brought even after the appellee had been tried on indictment and acquitted. The defendant had the right to trial by battle. The parties had to fight personally, save that a woman, a priest, an infant, a person over 60, or lame or blind might hire a champion. The battle took place before the judges of the King's Bench or Common pleas, and the parties were each armed with a staff an ell long and a leather shield, and battered each other from sunrise to star-rise or until one cried "Craven". The defendant could clear himself by the ordeal or, after this was abolished, by jury trial *per patriam*. If beaten in combat or found guilty, the defendant suffered the same judgment as if convicted on indictment, and the Crown had no power to pardon because the appeal was a private suit. It became obsolete but was not abolished and in 1817 Ashford brought a writ of appeal in the King's Bench against Thornton for the alleged rape and murder of Mary Ashford. Thornton had already been tried and acquitted of the charge at assizes; he demanded trial by battle against Ashford who declined to accept the challenge and Thornton was discharged: see *Ashford v. Thornton* (1818), 1 B. & Ald. 405; in the following year appeals of felony and trial by battle were abolished by statute.

12. The term *nolle prosequi* is defined in *ibid.* at 883 as follows:

In civil proceedings, an undertaking by the plaintiff not to proceed with his action at all or as to part of it, or as to certain defendants. The Attorney-General of England has power in any criminal proceedings on indictment at any time to enter a *nolle prosequi* and thereby to stay proceedings. The origin of the power is uncertain but the basis appears to be that the Crown, in whose name criminal proceedings are taken, may discontinue them. The first instance was in 1555. The court will not thereafter allow any further proceedings to be taken in the case, nor inquire into the reasons or justification for the Attorney-General's decision. It is not equivalent to an acquittal and does not bar a fresh indictment for the same offence.

In the U.S., the discretion is vested in the prosecutor such as the district attorney and may be used if the accused agrees to make restitution or to plead guilty to a lesser charge.

13. Stenning, *supra*, note 6 at 30-31.

14. *Ibid.* at 40.

comparable English statute: it was modelled not on the system in use in England, but on that in Scotland.¹⁵

Two Committees of the Executive Council of the Province of Canada dealt with problems in the administration of justice in Canada East and Canada West.¹⁶ The 1846 report of the committee discussed how, given the union of Upper and Lower Canada, to incorporate two Attorneys General and two Solicitors General into the government. It was recommended that all four law officers should continue to hold seats in Parliament, but that only the Attorneys General should remain in the Executive Council. The Attorney General's primary responsibility was to conduct personally the Crown's business before the courts and to advise Cabinet colleagues on legal matters. The Solicitors General were to continue to assist the Attorneys General in their duties, as requested, particularly in appearances before the courts. When none of the law officers was available to appear, the Attorney General or the Solicitor General could instruct counsel, usually Queen's counsel, to appear as their representative.¹⁷

With Confederation came several provisions of the *Constitution Act, 1867*¹⁸ that are particularly relevant to a discussion of the role of the Attorney General:

1. Subsection 91(27) giving the federal Parliament exclusive jurisdiction over "The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters";
2. Subsection 92(14) giving the provincial legislatures exclusive jurisdiction over "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts";
3. Section 63 providing that the Executive Council of Ontario and Quebec shall be composed of such persons as the Lieutenant Governor thinks fit, but in the first instance, must include *inter alia* the Attorney General and in Quebec must include the Solicitor General;
4. Section 134 providing for the appointment, under the Great Seal of the province, of *inter alia* the Attorney General and in Quebec the Solicitor General as well; and

15. See a discussion of the establishment of this system through *The Upper Canada County Attorneys' Act*, S.C. 1857, c. 59, in M. Bloos, "The Public Prosecutions Model From Upper Canada" (1989) 32 C.L.Q. 69.

16. Province of Canada, Committee of the Executive Council respecting the Salaries and Emoluments of the Law Officers of the Crown in this Province and the Fees to Queen's Counsel for Services rendered by them for the Crown payable out of the Public funds, 1844 (RG 1, E 1, Canada State Book C, pp. 563-569) and Province of Canada, Special Committee of the Executive Council in relation to the remuneration and duties of the Crown Law Officers, 1846 (RG 1, E 1, Canada State Book F, pp. 85-100) quoted in Stenning, *supra*, note 6 at 64-68.

17. Stenning, *supra*, note 6 at 64-68.

18. (U.K.), 30 & 31 Vict., c.3.

5. Section 135 providing that the Attorney General and Solicitor General continue to have all "Rights, Powers, Duties, Functions, Responsibilities or Authorities" as were vested in or imposed on them prior to Confederation until otherwise provided by the legislature.

The effect of this division of powers was to give conduct of the majority of criminal prosecutions to the provincial Attorneys General and their agents.

After Confederation, the federal and provincial governments each created the offices of Attorney General or Minister of Justice, although the titles are not uniform among provincial governments. To an extent these offices were based on the British model. In other significant aspects, they departed from that model. Certain aspects of the British arrangements will be considered both here and later, but a full explanation of the various offices in England and Scotland and their respective duties is set out in Appendix A.

The first post-Confederation federal legislation concerning the Attorney General was *An Act Respecting the Department of Justice*.¹⁹ This Act creates the Department of Justice, and provides for the appointment of a Minister of Justice. In the original 1868 version of the Act, the minister's duties are to act as official legal adviser to the Governor General and Cabinet, to see to it that the administration of public affairs is in accordance with the law, to have superintendence of all matters connected with the administration of justice in Canada within federal control, and to advise upon the legislative acts of the provincial legislatures.²⁰

The Act also provides that the Minister of Justice is *ex officio* the Attorney General of Canada. The Attorney General was by the 1868 Act entrusted with the powers and duties "which belong to the office of the Attorney General of England by law or usage".²¹ The Attorney General had the powers that pre-Confederation provincial laws had given to provincial Attorneys General, where such laws were now in the federal sphere. The Attorney General was also the legal adviser to government departments, was responsible for approving instruments issued under the Great Seal of Canada, had the superintendence of prisons and penitentiaries, and was to regulate and conduct all litigation on behalf of the Crown in right of Canada.²² In addition, when the North-West Mounted Police were created in 1873, supervision of the force was assigned to the Department of Justice.²³

The office of federal Solicitor General was created in 1887, by *An Act to make provision for the appointment of a Solicitor General*.²⁴ This Act provided for the appointment of a

19. S.C. 1868, c. 39.

20. *Ibid.*, s. 2.

21. *Ibid.*, s. 3.

22. *Ibid.*

23. *Administration of Justice, North West Territories Act*, S.C. 1873, c. 35. See the discussion of the establishment of this force in P. Stenning, *Legal Status of the Police*, Study Paper prepared for the LRC (Ottawa: Supply and Services Canada, 1981) at 45.

24. S.C. 1887, c. 14.

Solicitor General, whose duties were to "assist the Minister of Justice in the counsel work of the Department of Justice".²⁵ In effect, the Solicitor General was given the role traditionally assigned in England to the office, that of assistant to the Attorney General.

In each province the practice of assigning the duties of the Minister of Justice and Attorney General to one person was followed. The division of functions between those two offices was not uniform, however. A chart showing the various ways in which responsibilities have been divided is attached to this paper as Appendix B.

In providing that the same person was necessarily to fill the roles of Attorney General and Minister of Justice, both federal and provincial legislation departed from the English model that was the source of the offices. The Attorney General in England, for example, is not a member of Cabinet, and has responsibilities which are considerably more limited than in Canada. Responsibility for police and prisons in England rests with the Home Secretary, who also has some responsibility for the administration of courts. This responsibility is shared with the Lord Chancellor, who in addition recommends judicial appointments, supervises judges and courts, and serves as a legal adviser to the Cabinet. Both the Home Secretary and the Lord Chancellor are members of Cabinet, with the attendant political responsibilities.

Thus in the original legislation creating a federal Attorney General, Canada combined within one post responsibility for prosecuting, acting as legal adviser to the government, administering courts, supervising the police, and superintending prisons and penitentiaries. In addition, all of these duties were given to a member of Cabinet, with the political responsibilities that such a position entails. These are tasks that were, in the tradition from which they came, separated, and which today in England are divided among five different offices.

Since the original legislation there have been some amendments, but on the whole the structure is unchanged. Responsibility for the RCMP, prisons and penitentiaries, and parole and remissions was given to the Solicitor General in 1966.²⁶ This is a departure from the traditional English model of the Solicitor General's office, and is an anomaly that now exists federally and in six provinces.²⁷ With this exception, however, the functions assigned to the Minister of Justice and Attorney General remain today as they were in 1868.

25. *Ibid.*, s. 1.

26. *Government Organization Act, 1966*, S.C. 1966-67, c. 25, s. 4. Responsibility for prisons and penitentiaries had been transferred from the Attorney General to the Minister of Justice in the *Department of Justice Act*, R.S.C. 1906, c. 21.

27. In Nova Scotia, New Brunswick, Ontario, Alberta, and British Columbia, the Solicitor General is responsible for the Police, and in Quebec, the police are under the Minister for Public Security. The *Alberta Police Act*, S.A. 1988, c. P-12.01, s. 2, charges the Solicitor General with the administration of the Act, but still places all police services and peace officers under the direction of the Attorney General.

III. The Present Role of the Attorney General

A full understanding of the Attorney General in today's context requires consideration of each of the various roles the position entails. The Attorney General must act as a member of Cabinet, accountable to Parliament and the public. The Attorney General must superintend the prosecution service, directing the course of criminal prosecutions conducted by the state, and supervising private prosecutions. As head of the prosecution service, the Attorney General is accountable to the courts. The Attorney General federally has had, and in some provinces continues to have, responsibility for the police.

A. The Attorney General and Parliament

In England the Attorney General is not a member of Cabinet, and is independent from its dictates with respect to the exercise of prosecutorial authority. It has been clear since the early part of this century that the English Attorney General may seek the advice of Cabinet but is not required to do so. The most well-known explanation of this relationship is that of Lord Shawcross, while Attorney General of England in 1951:

I think the true doctrine is that it is the duty of an Attorney-General, in deciding whether or not to authorise the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other consideration affecting public policy. In order so to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the government, and indeed, as Lord Simon once said, he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations which might affect his own decision, and does not consist, and must not consist, in telling him what that decision ought to be. The responsibility for the eventual decision rests with the Attorney-General, and he is not to be put, and is not put, under pressure by his colleagues in the matter. Nor, of course, can the Attorney-General shift his responsibility for making the decision on to the shoulders of his colleagues. If political considerations which in the broad sense that I have indicated affect government in the abstract arise it is the Attorney-General, applying his judicial mind, who has to be the sole judge of those considerations.²⁸

It is noteworthy, however, that this independence is a matter only of convention. As one commentator has noted, it is difficult to find "any clear *legal* ground for asserting a right in the Attorney-General to act independently".²⁹

The extent to which the Attorney General of Canada is independent is less clear. Unlike in England, the Attorney General of Canada is a member of Cabinet, and is by statute also the Minister of Justice, responsible for "superintendence of all matters connected with the

28. Lord Shawcross' statement is to be found in J.L.J. Edwards, *The Law Officers of the Crown* (London: Sweet & Maxwell, 1964) at 223 [hereinafter *Law Officers*].

29. G. Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford: Clarendon, 1984) at 112.

administration of justice in Canada".³⁰ In addition, the Canadian Attorney General has always had duties and responsibilities held by the Home Secretary and Lord Chancellor in England, both of whom are members of Cabinet.

Stenning has pointed out that in colonial times, when the Attorney General was a professional lawyer retained by the government, "No law officer of these days could seriously have thought that he enjoyed, or was entitled to, anything resembling 'political independence' from the dictates of the Governor of the day."³¹ In 1840, after the union of the two Canadas, the Attorneys General (and Solicitors General) of Canada East and Canada West were required to hold seats in Parliament, and to "take part in political affairs".³² Stenning notes that "the two heads of the Janus-like government of the Province at this time, Baldwin and Lafontaine, were respectively the Attorneys General of Canada West and Canada East."³³ This combining of functions continued with Confederation, as Sir John A. Macdonald held the post of Attorney General between 1867 and 1873.³⁴

Further, Edwards points out (albeit "sadly") that prior to 1978:

[T]he evidence of previous administrations, irrespective of party affiliation, suggests that earlier Prime Ministers and Attorneys General subscribed to a totally different philosophy in which decisions in highly political cases were made by the Cabinet and carried out by the Attorney General.³⁵

Edwards then discusses cases in the St. Laurent, Diefenbaker and Pearson governments, suggesting that at those times:

[M]ost Ministers of the Crown would have viewed their involvement in the disposition of such prosecutorial questions in Cabinet as a natural application of the principle of collective responsibility for unpalatable political decisions.³⁶

In recent years, however, the "Shawcross principle" has been cited as applicable to Canada. Beginning in 1978 with Mr. Basford, at least four Attorneys General in Canada have embraced the statement of principle made by Lord Shawcross that the Attorney General

30. *Department of Justice Act*, R.S.C. 1985, c. J-2, s. 4(b).

31. *Supra*, note 6 at 288.

32. *Ibid.*

33. *Ibid.* at 288-289.

34. J.L.J. Edwards, *The Attorney General, Politics, and the Public Interest* (London: Sweet & Maxwell, 1984) at 358 [hereinafter *Attorney General*]. Edwards also points out that William Aberhart acted as Attorney General of Alberta while Premier, and that "Many instances are on record, well into the present century, where the Premier of a Provincial Government has simultaneously fulfilled the duties of Attorney General." Notable among these was Maurice Duplessis, Premier of Quebec, who also acted as Attorney General.

35. *Ibid.* at 361.

36. *Ibid.* at 362.

is not subject to control by the Cabinet in making prosecutorial decisions.³⁷ Mr. Basford stated:

The first principle, in my view, is that there must be excluded any consideration based upon narrow, partisan views, or based upon the political consequences to me or to others.

In arriving at a decision on such a sensitive issue as this, the Attorney General is entitled to seek information and advice from others but in no way is he directed by his colleagues in the government or by parliament itself.³⁸

The McDonald Commission reached a similar conclusion about the need for the Attorney General to put aside personal or party political concerns when determining whether to initiate a prosecution.³⁹

Several other writers have considered the role of the Attorney General, in particular with respect to *Charter of Rights* cases.⁴⁰ The Attorney General of Ontario stated that, if he was satisfied that a statutory provision creating an offence was unconstitutional, or that a prosecution would violate the accused's rights, it would be his duty to intervene to stay the proceedings.⁴¹ Taking this obligation a step further, Mr. Scott contemplated that if he was convinced that a fellow minister's proposed course of action was unconstitutional, and he was unable otherwise to prevent it, the Attorney General might have to take legal proceedings against that minister. He concluded:

The public and the legal profession should be vigilant to see that the Attorney General vigorously pursues this obligation in a matter that respects the fundamental principles of independence and objectivity that have historically guided the exercise of the Attorney General's responsibilities.⁴²

Nevertheless, the federal Attorney General is appointed by the Prime Minister and so could be dismissed from office for insisting on a course of conduct that is against the advice of the Cabinet. In such circumstances the Attorney General might feel compelled to resign

37. R. McMurtry, "The Office of the Attorney General" in D. Mendes da Costa, ed., *The Cambridge Lectures* (Toronto: Butterworths, 1981) at 2-3 and 5-6 (former Attorney General of Ontario) and I. Scott, "The Role of the Attorney General and the Charter of Rights" (1986-87) 29 C.L.Q. 187 at 189-192 (present Attorney General of Ontario). The remarks of Mr. R. Basford and Mr. M. Macguigan (both former federal Ministers of Justice) are quoted in Edwards, *Attorney General*, *supra*, note 34 at 359-364.

38. Canada, *House of Commons Debates* at 3881 (17 March 1978).

39. Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Third Report: Certain R.C.M.P. Activities and the Question of Governmental Knowledge* (Ottawa: Supply and Services Canada, 1981) (Chairman: Justice D.C. MacDonald) at 509.

40. See, e.g., Scott, *supra*, note 37; D.C. Morgan, "Controlling Prosecutorial Powers — Judicial Review, Abuse of Process and Section 7 of the Charter" (1986-87) 29 C.L.Q. 15; J.L.J. Edwards, "The Attorney General and the Charter of Rights" in R. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) at 45-68.

41. Scott, *supra*, note 37 at 199.

42. *Ibid.*

before being dismissed.⁴³ Either event could be expected to have a serious political impact affecting even the government's survival.

It is also clear, having been stated both by Attorneys General and the judiciary, that the Attorney General is accountable to Parliament or the appropriate legislature. One leading case that expressly refers to this accountability is *Smythe v. The Queen*.⁴⁴ In that case, Chief Justice Fauteux stated that the court could not review the exercise of the Attorney General's discretion regarding the election to proceed by way of summary conviction, but that the Attorney General could be questioned in the legislature about the decision, and sanctioned by that body, if appropriate.

This amounts to saying that the accountability of the Attorney General to Parliament lies in the fact that ministers of the Crown can be called upon to answer questions in the House and can be censured by the House. But this theoretical accountability must be considered in the context of the reality that party solidarity would likely lead to the support of any Attorney General, whether independent in decision-making or not. As Lord Shawcross noted:

Responsibility to Parliament means in practice at the most responsibility to the party commanding the majority there, which is the party to which the Attorney General of the day must belong. One has only to remember the so-called Shrewsbury "martyrs" and the Clay Cross affair to realize that that party will obviously not criticize the Attorney General of the day for not taking action which, if taken, might cause embarrassment to their political supporters.⁴⁵

Further, it is the view of Edwards⁴⁶ that this accountability arises only after the fact: when the decision not to prosecute has been made, or when the prosecution is complete. The Attorney General cannot, it seems, be required to defend a decision while the case is still before the courts. As a result, Stenning points out:

[T]he very nature of the Attorney General's prosecutorial discretion, and the desire to ensure that the administration of criminal justice is kept as far as possible removed from strong political pressures, have tended to ensure that parliamentary control over his discretion in this area can only be less than adequate. In the first place, in the pressure of business with which Legislatures are involved, they inevitably can and do become far removed from the stream of run-of-the-mill criminal prosecutions which are processed through the inferior

43. Although such events are not common, the former Attorney General of British Columbia, Brian Smith, resigned his post in 1988: see note 4. Similarly, in 1977, Robert Ellicott resigned his post as Attorney General of the Commonwealth of Australia. Edwards, in *Attorney General*, *supra*, note 34, notes at 384 that in his letter of resignation to the Prime Minister, Ellicott charged that "decisions and actions which you and the Cabinet have recently made and taken have impeded and in my opinion have constituted an attempt to direct or control the exercise by me as Attorney General of my discretion". In his resignation speech, Mr. Ellicott quoted Lord Shawcross' statement of principle.

44. [1971] S.C.R. 680.

45. This quotation from Lord Shawcross was itself quoted in the paper given by the former Attorney General of Ontario, R. McMurtry, *supra*, note 37 at 5.

46. *Law Officers*, *supra*, note 28 at 224-225.

courts every day. The volume and low visibility of these cases (which form the vast bulk of all criminal cases heard by the courts) make it fairly easy for abuses to go undetected by the politicians, and ensure that parliamentary control over such abuses is unlikely to be very consistently effective. . . . Secondly, such valuable parliamentary rules as the *sub judice* rule ensure to some extent that even when abuses do come to the attention of politicians, such control as they are able to exercise through the parliamentary process, being necessarily *ex post facto*, will often have very limited effectiveness in terms of securing justice for the accused. . . . The *sub judice* rule ensures that, once a prosecution has been launched, it is not until after the accused has been acquitted or convicted that the politicians can do anything about it. . . .⁴⁷

Thus there are limits on both the accountability that can be demanded, and the control that can be exerted by a legislature.

It must also be noted that the "Shawcross principle" itself — that the Attorney General is to be free from political influences — has been questioned. Edwards has suggested that some qualification must be made to the principle, to take account of a distinction between types of political considerations. What the Attorney General must ignore are partisan political considerations: that is, considerations "designed to protect or advance the retention of constitutional power by the incumbent government and its political supporters."⁴⁸ On the other hand the Attorney General should have regard to "non-partisan" political considerations such as "maintenance of harmonious international relations between states, the reduction of strife between ethnic groups, the maintenance of industrial peace and generally the interests of the public at large."⁴⁹

However, this distinction has not been universally accepted. It has been pointed out in reply that

[E]ven those decisions which have the greatest appearance of consensus (e.g. laws passed by a representative democratic parliament) cannot necessarily be automatically characterized as "non-partisan", since they are almost invariably the product of a partisan political system in which one partisan faction (or a coalition of partisan factions) predominates and is able to implement its own policies. The distinction between partisan and non-partisan decisions according to this view, is not one of kind but of degree, and relies heavily for its validity on the ability of the dominant political faction to convince the populace that the decisions it proposes to implement "involve the wider public interest that benefits the population at large".⁵⁰

Further, although it may be clear that the public interest is involved in a decision, that does not make clear what the decision should be. The nature of the political process is such that different political parties will in good faith disagree. It has been noted that the

47. *Supra*, note 6 at 303-304.

48. J.L.J. Edwards, *Ministerial Responsibility for National Security* (Ottawa: Supply and Services Canada, 1980) at 69-70.

49. *Ibid.*

50. Stenning, *supra*, note 6 at 291-292.

maintenance of harmonious international relations, reduction of strife between ethnic groups, and maintenance of industrial peace

[A]re precisely the areas in which conservative and socialist politicians trust each other least. It might be, for example, that a politician holding the office of Attorney-General could believe that industrial peace would be endangered if legal proceedings were taken against strikers acting unlawfully in the alleged pursuance of a trade dispute. He might be right in this factual supposition, but those of a different political persuasion might not be willing to accept a decision based on this view as non-partisan.⁵¹

Given this, it is not sufficient simply to say that the Attorney General may give consideration to the wider public interest. It is not difficult to imagine circumstances in which the Attorney General claims to act based on the public interest, but is accused by opposition parties of acting out of partisan political motives. This is not to say that non-partisan political considerations do not exist; it is simply that the distinction between partisan and non-partisan motives may not always be clear in practice. In such circumstances the final arbiter must be public opinion. If the majority of the population is persuaded that the motives are non-partisan and acceptable, then the government will continue to have public support; if the public are not so persuaded, the government, or at least the Attorney General, will lose that support. Ultimately public opinion provides the only measure of whether a political motive is non-partisan.

Though there may be disagreement on how clear this distinction is in practice, it does not seem to be questioned by anyone that, in principle, partisan political considerations have no place in the normal operation of the prosecution service. The tradition in England, and in Canada, that the Attorney General is only in unusual circumstances involved in individual prosecutions is one method of achieving this aim. The tradition that exists in England, and which has recently been affirmed in Canada, against Cabinet direction of any decision by the Attorney General concerning individual prosecutions is a second method. But an important point flows from this. It must be recognized that the independence of the Attorney General is not an end in itself; rather, it is a means of assuring that improper motives do not enter into the decision whether to prosecute.⁵²

51. Marshall, *supra*, note 29 at 115.

52. Edwards, in *Attorney General* (*supra*, note 34), notes at 362-363 that:

In making these decisions it should not be assumed that the Cabinet would necessarily be governed by politically partisan motives. At the same time, it would be unrealistic not to envisage situations in which, in the absence of any clearly understood constitutional prohibition against the referral by the Attorney General of prosecution matters for decision by the Cabinet or any group of ministers or by the Prime Minister, partisan influences would rise to the surface and prevail in whatever decision ultimately emerged.

In reply, it might be suggested that an equally useful protection would be the understanding by Cabinet that partisan motives should not affect their decisions on prosecutorial matters, when political considerations do arise. This is arguably a better safeguard, since it is a direct rather than indirect statement of the relevant principle.

In light of this, and also in recognition that there are times when wider considerations of public interest should indeed affect individual prosecutions, there are those who disagree with the principle of the independence of the Attorney General, if this is taken to mean that the decision to prosecute in individual cases will always, in the end, be a decision made exclusively by the Attorney General.⁵³ Prosecutorial decisions are not alone in having potentially far-reaching consequences; decisions on matters of defence, foreign relations, the environment, or public health and safety can have equally broad consequences. This is not taken to be a justification for excluding Cabinet from any say in those decisions.⁵⁴

In the same context, it can be questioned what the purpose of mere consultation by the Attorney General with the Cabinet might be. There would be little sense in the Attorney General, the legal adviser to the government, seeking legal advice from the Cabinet. But if the advice sought is not legal, then that suggests that the decision is not merely a legal one. In this case, one might hold that there is no reason in principle for the decision to be restricted to the law officer.⁵⁵

Nonetheless it must be recognized that the principle of the independence of the Attorney General has become increasingly entrenched as a constitutional convention. This recognition raises several issues that must be borne in mind in considering any reform of the Attorney General's office. First, political considerations should not in normal circumstances affect prosecutorial decisions. However, when individual cases do raise political considerations, partisan motives must not be brought to bear. In such circumstances the Attorney General may seek the advice of Cabinet, but is not bound by that advice. Lastly, the final judges of whether a motive is partisan or not are the public. Any adequate system must see to it that these principles are protected.

53. Lord Asquith, writing in 1924, discussed the decision to be made in 1914 in England whether to prosecute leaders of the Ulster movement for high treason. He queried:

Is it really suggested that the Law Officers of the day should have assumed the undivided responsibility for instituting or withholding proceedings and that the Cabinet could have claimed no voice in a decision on which the whole political future of Ireland might have turned? (quoted in Edwards, *Law Officers*, *supra*, note 28 at 214, n. 48).

54. P. Stenning, *Submission to the Royal Commission Investigating the Prosecution of Donald Marshall, Jr.* [unpublished].

55. Edwards, in *Attorney General* (*supra*, note 34 at 363), discusses Cabinet consideration by the St. Laurent government of the case of James Endicott, a Canadian clergyman who had made statements suggesting that bacteriological weapons had been used by United Nations Forces during the Korean war. The Cabinet minutes show discussion of the fact that the easiest charge to prove would be treason, but that the only penalty at the time on conviction was death. The Cabinet noted that there would be a great deal of unfavourable international attention. One could well argue that these are non-partisan political considerations, and that there is in fact nothing objectionable about this type of Cabinet involvement.

Marshall (*supra*, note 29 at 113-114) argues that there is a distinction between an Attorney General seeking advice on the political advisability of a prosecution, and seeking advice about facts within the knowledge of another minister. He gives the example of a decision by an Attorney General in the Heath government in Britain seeking advice from the Secretary of State for Foreign Affairs on whether lives of hostages held by Palestinian guerrillas would be in greater danger if a particular airline hijacker were prosecuted.

B. The Attorney General and Crown Prosecutors

Individual prosecutions are actually conducted for the most part by public prosecutors, or "Crown Attorneys", acting as agents for the Attorney General. The historical development of the office of public prosecutor, and its present relationship to the Attorney General, must therefore be understood.

In the pre-Confederation Province of Canada, the Attorney General had little time to devote to court appearances as a result of the increasingly political nature of responsibilities in the Executive Council and Parliament.⁵⁶ This was also the case with the deputy, the Solicitor General. As well, the increase in population made it more difficult for these two law officers personally to appear in court on all of the Sovereign's business. When neither was available, Queen's counsel or "Crown counsel" were appointed on an *ad hoc* basis to represent them for the duration of a session of the court. However, these counsel did not enjoy the prerogatives of the law officers. In Upper Canada, and later in Ontario, it became expedient to appoint County Attorneys, who were later known as Crown Attorneys. These attorneys supervised the prosecution work, at first, on a part-time fee for service basis.

Following Confederation similar duties were conferred on officials designated as prosecuting officers or Crown attorneys in other provinces. The theoretical degree of independence varied among the provinces: in some provinces the local prosecutor was legally under the complete control of the provincial Attorney General, while in other cases the Crown attorneys enjoyed the rights and privileges of the Attorney General and Solicitor General when carrying out their prosecution functions. In other provinces, and in the federal system where there was no statutory recognition of Crown attorneys or public prosecutors, counsel are still employed on a full-time or part-time basis and exercise prosecutorial authority as counsel, agents, or delegates of the Attorney General.⁵⁷

There have only been relatively minor changes in the duties of Crown attorneys during the last 130 years.⁵⁸ Their primary responsibilities are to conduct prosecutions for indictable offences, to conduct prosecutions for summary conviction offences (where the public interest so requires), to supervise private prosecutions and take over the case where justice towards the accused requires, to deal with questions of the sufficiency of sureties, and to provide legal advice to justices of the peace.⁵⁹ At the present time Crown attorneys must also examine documents sent by coroners, justices of the peace, and provincial judges to determine if further evidence needs to be gathered, or witnesses summoned to avoid a charge being dismissed for insufficiency of proof.⁶⁰

56. Stenning, *supra*, note 6 at 109-110.

57. *Ibid.* at 121-130.

58. See *The Upper Canada County Attorneys' Act*, *supra*, note 15 and *Crown Attorneys Act*, R.S.O. 1980, c. 107.

59. *Crown Attorneys Act*, *supra*, note 58, s. 12. Subsection 12(j) of this Act, giving the Crown Attorney the power to determine the sufficiency of sureties, was recently challenged under the *Charter*, but was upheld. However, the court held that this power was subject to Part XVI of the *Criminal Code*, allowing an applicant to have the question determined by the court. See *R. v. Dewsbury* (1989), 39 C.R.R. 301 (Ont. H.C.).

60. *Crown Attorneys Act*, *supra*, note 58, s. 12(a).

It is our view that Crown attorneys are accountable to, and under the control of, the Attorney General. Some writers have disputed this position, particularly in Ontario,⁶¹ but the majority of historical and contemporary evidence supports the existence of this accountability.⁶² However, of necessity the local Crown attorney has a "broad and generous area of unfettered discretion in criminal prosecutions."⁶³ Thus while Crown prosecutors are theoretically accountable to, and under the control of, the Attorney General, it is only in the most exceptional cases that the Attorney General would become directly involved in, or even knowledgeable about, a particular case. The Attorney General bears responsibility for the issuing of "wide and general guidelines as to policy",⁶⁴ but the day-to-day administration of justice must be in the hands of the local Crown attorneys or agents.

The legal effect of these policy guidelines has received some recent attention. In *R. v. Catagas*⁶⁵ the Manitoba Court of Appeal considered an allegation of abuse of process because the accused, a native Indian, was prosecuted for breach of the *Migratory Birds Convention Act*;⁶⁶ this prosecution, the accused alleged, was contrary to a policy of the provincial and federal governments (though the policy does not appear to have come from the Attorney General). The court held that the abuse-of-process argument failed since the policy itself was illegal, contrary to well-established constitutional principles that "[t]he Crown may not suspend laws or the execution of laws without the consent of Parliament; nor may it dispense with laws, or the execution of laws; and dispensations by *non obstante* [notwithstanding] of or to any statute or part thereof are void and of no effect, except in such cases as are allowed by statute."⁶⁷ The court, however, went out of its way to point out that the holding in this case did not affect the legitimate exercise of prosecutorial discretion:

Not every infraction of the law, as everybody knows, results in the institution of criminal proceedings. A wise discretion may be exercised against the setting in motion of the criminal process. A policeman, confronting a motorist who had been driving slightly in excess of the speed limit, may elect to give him a warning rather than a ticket. An Attorney-General, faced with circumstances indicating only technical guilt of a serious offence but actual guilt of a less serious offence, may decide to prosecute on the latter and not on the former. . . . But in all these instances the prosecutorial discretion is exercised in relation to a specific case. It is the particular facts of a given case that call that discretion into play. But that is a far different thing from the granting of a blanket dispensation in favour of a particular group or race. . . .

61. K. Chasse, "The Role of the Prosecutor" in S. Oxner, ed., *Criminal Justice: Papers Prepared for Presentation at the Canadian Institute for the Administration of Justice Conference on Criminal Justice held at Halifax, October 28, 29 and 30, 1981* (Toronto: Carswell, 1982).

62. See, e.g., the comments of former Ontario Attorney General John Clement, quoted in Chasse, *ibid.* at 83, and also the remarks of a former Crown Attorney, the Honourable Judge Graburn, "The Relationship of the Crown Attorney to the Attorney General" (1976) 35 C.R.N.S. 259 at 270-271.

63. Former Ontario Attorney General John Clement, cited in Chasse, *supra*, note 61.

64. *Ibid.* at 84.

65. (1977) 38 C.C.C. (2d) 296 (Man. C.A.).

66. R.S.C. 1970, c. M-12.

67. *Halsbury's Laws*; 3rd ed., vol. 7 (London: Butterworths, 1954) para. 486 at 230, cited in *R. v. Catagas*, *supra*, note 65 at 297.

The Crown may not by Executive action dispense with laws. The matter is as simple as that, and nearly three centuries of legal and constitutional history stand as the foundation for that principle.⁶⁸

Therefore the Attorney General cannot unlawfully fetter the discretion that is inherent in that office, nor that of the counsel who derive their power from, and are accountable to, it. To determine the legality of guidelines one would have to determine whether they would be a lawful exercise of discretion if exercised by the Attorney General personally. It would seem that, so long as there remains room to examine the individual case on its own merits, the guidelines would not be improper.⁶⁹

The Attorney General is accountable to the legislature for the actions of the agents employed as prosecutors, and so must have the right to intervene in any particular case and direct the manner of the prosecution. Such direct interventions, however, leave the Attorney General vulnerable to allegations of partisan political influence. While there is nothing improper in the Attorney General personally exercising power, perhaps in the face of advice from the local prosecutor, in practice one would expect this to occur only when the matter was of such importance that a decision at the highest level was required. Interventions in more mundane prosecutions would raise the question as to why it was felt necessary to intervene. Therefore there is a useful function fulfilled in issuing broad policy guidelines to Crown counsel: the guidelines keep prosecutors accountable to the Attorney General, without seeming to involve improper considerations.

To conclude, while theoretically the public prosecutors are accountable to, and under the control of, the Attorney General, as a practical matter responsibility for individual prosecutions is in most cases exercised at the local level.

C. The Attorney General and Private Prosecutors

Another important aspect of the role of the Attorney General, similar in some ways to the relationship to Crown prosecutors, is the relationship between the Attorney General and private prosecutors.⁷⁰ On the one hand, by its very nature, criminal law concerns acts that are serious enough to be regarded not merely as wrongs to an individual, but to the state. For this reason, most criminal proceedings involve the resources of the state, being investigated by the police and prosecuted by a Crown prosecutor. On the other hand, most

68. *R. v. Catagas*, *supra*, note 65 at 301.

69. An example of guidelines that have affected a very large number of prosecutorial decisions are those of the federal Department of Justice which set out when the charge of importing will be laid in an "border possession" case (which carries with it a statutory minimum of seven years), and when the charge of possession for the purpose of trafficking (which carries no minimum sentence) will be laid. Although the mandatory minimum seven years has recently been struck down by the Supreme Court of Canada (*R. v. Smith*, [1987] 1 S.C.R. 1045), these guidelines operated for several years, and affected the exercise of a prosecutorial discretion which had enormous impact on accused.

70. The Commission has considered this issue at length in a previous working paper: see LRC, *Private Prosecutions*, Working Paper 52 (Ottawa: The Commission, 1986).

of the formal mechanisms for prosecutions are equally available to any private individual. For example, under section 504 of the *Code*, the power to lay an information before a justice rests with anyone, and "prosecutor" is defined in section 2, where the Attorney General does not intervene, to mean "the person who institutes proceedings to which this Act applies". Thus, in principle, it is open to any private citizen to commence and continue a criminal prosecution.

There are two important aspects of the relationship between the Attorney General and private prosecutors. The first is the supervisory role played by the Attorney General. The second concerns the different powers, in particular related to guarding the public interest, that may be exercised by each.

Even when a prosecution has been commenced privately, the Attorney General retains the right to intervene in the proceedings. Such intervention can have two purposes. It is open to the Attorney General to intervene in a private prosecution in order to conduct the prosecution.⁷¹ Equally, the Attorney General can intervene simply in order to stay proceedings.

The Attorney General might intervene to continue proceedings that a private prosecutor intends to abandon, where the Attorney General considers the proceedings to be in the public interest.⁷² Equally, the Attorney General can intervene simply on the ground that the charge is an appropriate one, and ought to be conducted by the state.⁷³

However, intervention to stay proceedings is more common. Historically this power reflects the Attorney General's ability to enter a *nolle prosequi*, the basis of which is that "it was natural for the Crown, in whose name criminal proceedings were instituted, to reserve the right to terminate the same proceedings at will."⁷⁴ The significance of this power should not go unrecognized: it allows the Attorney General to deprive a private prosecutor of the right to conduct a prosecution.

In the use of this power, the Attorney General is not ordinarily subject to review by the courts.⁷⁵ Rather, the Attorney General is accountable for its use to Parliament. The policy behind the *nolle prosequi* power, equally applicable to the power to intervene and stay proceedings, has been stated to be:

71. *Re Dowson and R.* (1980), 57 C.C.C. (2d) 140 (Ont. H.C.); *R. v. Hauser*, [1979] 1 S.C.R. 984 at 1011-1012, per Dickson J., dissenting on other grounds; *Re Osioy and R.* (1989), 50 C.C.C. (3d) 189 at 191 (Sask. C.A.).

72. See, e.g., *Re Bradley and R.* (1975), 9 O.R. (2d) 161 (C.A.), where the Attorney General intervened to continue with a privately laid charge of intimidation under s. 423 (then s. 381) of the *Code*, arising out of a labour dispute.

73. Our consultants in British Columbia indicate that private prosecutions commenced in that province are uniformly examined by the Attorney General's office. If they do not feel that a case is made out for prosecution, the Attorney General intervenes to stay the proceedings. If they feel that prosecution is appropriate, then the Attorney General's department takes over the proceeding.

74. Edwards, *Law Officers*, *supra*, note 28 at 227.

75. The one limited exception to this rule is discussed below in "The Attorney General and the Courts" at 22.

In this country, where private individuals are allowed to prefer indictments in the name of the Crown, it is very desirable that there should be some tribunal having authority to say whether it is proper to proceed farther in a prosecution. That power is vested by the constitution in the Attorney General, and not in this Court.⁷⁶

Ultimately, then, the Attorney General has supervisory authority over all prosecutions. Even in the case of privately commenced and conducted prosecutions, it will be true that no criminal proceeding occurs without at least the Attorney General's sufferance. In this sense, then, the Attorney General is ultimately accountable to Parliament not only for using the power to intervene and stay charges, but also for a decision not to intervene.

Also significant, and reflecting the Attorney General's supervisory role, is the difference in powers between private prosecutors and the Crown. The powers of each to lay a charge and to proceed with a prosecution are generally the same.⁷⁷ However, some differences do arise due to the Attorney General's wider responsibility for the administration of justice as a whole. In particular, some prosecutions require the consent of the Attorney General before a charge, private or otherwise, can be laid. In addition, the Attorney General is the guardian of the public interest, and as a result has powers and responsibilities beyond those of the private prosecutor.

We will discuss the consent requirement in more detail later in this paper.⁷⁸ For the moment, it suffices to point out that although the majority of *Criminal Code* provisions do not require consent, a small number do.⁷⁹ In the case of these offences, the Attorney General's

76. *R. v. Allen* (1862), 1 B. & S. 850 at 855, 121 E.R. 929. We suggest that this statement is equally applicable to Canada.

77. There are some differences with the carriage of a prosecution in the case of indictable offences, most notably regarding the right to prefer an indictment and to appeal the trial decision. These differences are discussed at greater length in *Private Prosecutions*, *supra*, note 70.

78. See "Consent to Prosecutions" below at 67.

79. Some of the offences that require the consent of the Attorney General prior to launching a prosecution are as follows:

- s. 7(7)(aircraft offences) Attorney General of Canada
- s. 119(2)(bribery of judicial officers) Attorney General of Canada
- s. 136(3)(giving contradictory evidence) Attorney General
- s. 164(7)(obscene publications, following *in rem* proceedings) Attorney General
- s. 166(3)(unlawful publication, judicial publications) Attorney General
- s. 172(4)(corrupting children) Attorney General
- s. 174(3)(public nudity) Attorney General
- s. 251(3)(unseaworthy vessel) Attorney General of Canada
- s. 318(3)(advocating genocide) Attorney General
- s. 319(6)(inciting hatred) Attorney General
- s. 347(7)(loansharking) Attorney General
- s. 385(2)(fraudulent concealment of title documents) Attorney General
- s. 422(3)(criminal breach of contract) Attorney General
- s. 740(2)(breach of probation out of province where offence committed) Attorney General
- s. 803(3)(failure to appear under s. 145 where trial proceeded *ex parte*) Attorney General

Note that some sections specify that it is the Attorney General of Canada who must consent prior to a prosecution, for example s. 251(3), taking an unseaworthy ship to sea.

supervisory ability extends not merely to discontinuing prosecutions, but to preventing them from being brought in the first place. Unlike the ability to discontinue proceedings, this supervision takes place without the need for any public act. Thus, although the Attorney General is still accountable for this aspect of the supervisory role, that accountability is limited by the fact that the public may have no knowledge of the action, or lack of action, on the part of the Attorney General.

In the role of guardian of the public interest, the Attorney General may undertake actions other than criminal prosecutions. In particular, and for example, the Attorney General may be called upon to bring civil proceedings, by means of a relator action, to enjoin a public nuisance, or to prevent the repeated commission of an offence.⁸⁰ The Attorney General always has the right to bring such action. The abilities of a private citizen to do so are very limited, as is the ability of a court to review a decision of the Attorney General in this regard. It is in this role, in many ways, that the independent and supervisory role of the Attorney General is most clearly seen.

The ability of the Attorney General to exercise discretion has been recognized in both Britain and Canada. In discussing the issue, Lord Halsbury noted that:

My Lords, one question has been raised, . . . which I confess I do not understand. I mean the suggestion that the Courts have any power over the jurisdiction of the Attorney-General when he is suing on behalf of a relator in a matter in which he is the only person who has to decide those questions. It may well be that it is true that the Attorney-General ought not to put into operation the whole machinery of the first law officer of the Crown in order to bring into Court some trifling matter. But if he did, it would not go to his jurisdiction, it would go, I think, to the conduct of his office, and it might be made, perhaps in Parliament, the subject of adverse comment; but what right has a Court of law to intervene? If there is excess of power claimed by a particular public body, and it is a matter that concerns the public, it seems to me that it is for the Attorney-General and not for the Courts to determine whether he ought to initiate litigation in that respect or not. . . . In a case where as a part of his public duty he has a right to intervene, that which the Courts can decide is whether there is the excess of power which he, the Attorney-General, alleges. Those are the functions of the Court; but the initiation of the litigation, and the determination of the question whether it is a proper case for the Attorney-General to proceed in, is a matter entirely beyond the jurisdiction of this or any other Court. It is a question which the law of this country has made to reside exclusively in the Attorney-General.⁸¹

It is also possible for a relator action to be taken by a private prosecutor. However, the power of a private prosecutor to bring such an action is strictly circumscribed.

If the action is one concerning which the private prosecutor has no special interest — that is, the action can only be justified on the basis of the public interest generally — then the consent of the Attorney General is required. The ordinary interest of any private citizen

80. See Edwards, *Law Officers*, *supra*, note 28 at 286ff.

81. *London County Council v. Attorney General*, [1902] A.C. 165 at 168-169. This case has been cited in Canada for the principle of the independence of the Attorney General in making these decisions: see e.g., *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607

is not sufficient to clothe that person with the same authority and standing as the Attorney General. This point was the subject of disagreement in Britain between the Court of Appeal and the House of Lords in *Gouriet v. Union of Post Office Workers*, with the House of Lords, of course, having the final say.⁸²

In that case, a private citizen was refused the consent of the Attorney General to bring a relator action, and so sought to bring the action on his own. The Court of Appeal held that he had the right to do so, but the House of Lords overturned this decision. Lord Wilberforce noted that:

The Attorney-General's right to seek, in the civil courts, anticipatory prevention of a breach of the law, is a part or aspect of his general power to enforce, in the public interest, public rights. The distinction between public rights, which the Attorney-General can and the individual (absent special interest) cannot seek to enforce, and private rights is fundamental in our law. To break it, as the plaintiff's counsel frankly invited us to do, is not a development of the law, but a destruction of one of its pillars. . . . More than in any other field of public rights, the decision to be taken before embarking on a claim for injunctive relief, involving as it does the interests of the public over a broad horizon, is a decision which the Attorney-General alone is suited to make.⁸³

Thus, generally speaking, there is what has been described as "discretionary control of the Attorney General over public interest standing."⁸⁴ However, the Supreme Court has recognized a limited exception to this rule, according to which a private litigant may be granted standing to challenge the validity of legislation.

Of course, in one sense, it is generally open to a private litigant to challenge criminal legislation by means of a test case. By violating a law, a litigant can arrange to mount a court challenge to legislation, using that challenge as a defence in a prosecution. This right is very limited, particularly as the litigant, if unsuccessful, will be convicted of a criminal offence. More interesting from the perspective of the relationship between the Attorney General and private prosecutors is the ability of a private litigant directly to challenge a law.

The Supreme Court has recognized that there is a role for private citizens to play in this regard. Normally, to challenge legislation, a litigant must show a special interest beyond that of most people to be granted standing.⁸⁵ However, due to the decisions in *Thorson v.*

82. [1978] A.C. 435 (H.L.); rev'g [1977] 1 Q.B. 729 (C.A.).

83. *Gouriet*, *supra*, note 82 at 482 (H.L.).

84. *Finlay v. Canada (Minister of Finance)*, *supra*, note 81 at 618.

85. See *ibid.* at 619, where LeDain J. quotes *Boyce v. Paddington Borough Council*, [1903] 1 Ch. 109 to the effect that:

A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such that some private right of his is at the same time interfered with. . . and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.

Attorney General of Canada,⁸⁶ *Nova Scotia Board of Censors v. McNeil*,⁸⁷ and *Minister of Justice of Canada v. Borowski*⁸⁸ a slightly wider scope exists.

The facts in each of these cases differ, of course, but all hold that in some circumstances a private litigant should be granted standing to seek a declaration that particular legislation is invalid. In *Borowski*, for example, the court was faced with a challenge to the sections of the *Criminal Code* that allowed abortions on the approval of a hospital therapeutic abortion committee. The court considered the earlier decisions in *Thorson* and *McNeil*, as well as the possibility of the legislation in question being challenged by any other means. The court pointed out that the legislation was exculpatory, and therefore that no one directly affected by it would have any interest in challenging it. The court granted standing, laying down the rule that

[T]o establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.⁸⁹

Thus a private prosecutor can share to a very small extent in the public-interest jurisdiction of the Attorney General. However, the extent of this power in the private litigant should not be exaggerated. By implication, *Borowski* suggests that if the route of challenging legislation by means of being charged under it is open, though that route is less satisfactory from an individual's point of view, nonetheless a declaration cannot be sought.

In the final analysis, then, it remains to the Attorney General to be the primary guardian of the public interest, as well as supervising criminal prosecutions. The role of private prosecutors is very much subordinate to that of the Attorney General. By contrast, in supervising private prosecutions, and in determining what actions ought to be brought in the name of the state, the Attorney General is largely immune from review.

D. The Attorney General and the Courts

The Attorney General does not often appear personally in court, and so judicial scrutiny is more often directed at the Attorney General's agents, the Crown prosecutors. However, in certain circumstances decisions of the Attorney General personally are considered by the court.

86. [1975] 1 S.C.R. 138.

87. [1976] 2 S.C.R. 265.

88. [1981] 2 S.C.R. 575.

89. *Ibid.* at 598.

Decisions of the executive are reviewable by the courts.⁹⁰ In the context of this paper, the interesting question is the extent to which decisions of the Attorney General in relation to individual criminal cases — for example, to stay charges — are reviewable.

In *Campbell v. Attorney-General of Ontario*,⁹¹ the Ontario Court of Appeal held that the courts would not interfere with an Attorney General's decision to stay proceedings absent "flagrant impropriety". The court upheld the decision of the trial judge, who had examined the reasons offered by the Attorney General's agent, and found them not to constitute flagrant impropriety.

In a similar case in Quebec, the judge at trial held that the Attorney General's decision could be overturned by the court if the Attorney General's reasons for staying the prosecution were not sufficient to "justify" the action.⁹² The Quebec Court of Appeal overturned this decision, adopting reasons similar to those in *Campbell v. Attorney-General of Ontario*.⁹³ However, they also rejected the contention that the court could not review an exercise of the Attorney General's discretion at all, holding that a stay could be set aside if the Attorney General were shown to have acted with bias or had abused the law.⁹⁴

Other decisions of an Attorney General may come under review. A duty of fairness in the exercise of statutory and discretionary power has recently been affirmed in Canadian law.⁹⁵ This duty allows for some judicial supervision of executive decisions; for example, it has been held to apply to the Minister of Justice when exercising a discretion under an extradition treaty to insist on assurances from the demanding state that no death sentence will be carried out,⁹⁶ or when considering an application for mercy under section 690 of the *Criminal Code*.⁹⁷

This is not to say that every administrative decision is reviewable. It is doubtful, for example, that a decision to lay a charge would be, or should be, reviewable by the courts.

90. *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441.

91. (1987) 35 C.C.C. (3d) 480 (Ont. C.A.); aff'd (1987) 31 C.C.C. (3d) 289 (Ont. H.C.). The case concerned a stay entered by the Attorney General of a privately commenced prosecution against the Morgentaler abortion clinic. The Attorney General stayed the prosecution, since the issue was still pending before the Supreme Court of Canada.

92. *Chartrand v. (Quebec) Minister of Justice* (1986), 55 C.R. (3d) 97 (Que. S.C.).

93. *Attorney General of Quebec v. Chartrand; Machabee v. Chartrand* (1987), 59 C.R. (3d) 388 (Que. C.A.). See also *Re Osiowy and R.*, *supra*, note 71, which requires proof of "flagrant impropriety" as the standard for interference with a decision by the Attorney General to stay charges.

94. *Attorney General of Quebec v. Chartrand; Machabee v. Chartrand*; *supra*, note 93 at 390 and 393.

95. *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311.

96. *Kindler v. Canada (Minister of Justice)*, [1987] 2 F.C. 145 (T.D.). Rouleau J. accepted that the minister had a duty to act fairly when exercising his discretion under Article 6 of the Extradition Treaty between Canada and the United States of America.

97. *Wilson v. Minister of Justice*, [1985] 1 F.C. 586 (A.D.).

That decision undeniably affects an accused, but only by setting into motion a system which is itself equipped with protections for the rights of the accused.⁹⁸

The decision to proceed with a charge may come before a court, however, not in the form of a judicial review of that decision, but in the context of an action for malicious prosecution against the Attorney General or a Crown prosecutor. Whether such an action is possible has recently been considered by the Supreme Court of Canada in the *Nelles* decision; until that decision, the Attorney General and Crown prosecutors enjoyed absolute immunity from prosecution in some provinces. The Supreme Court has now made it clear that the Attorney General does not enjoy such an immunity.⁹⁹

The policy arguments in favour of immunity, which had been adopted by the Ontario Court of Appeal, were considered by Mr. Justice Lamer in his decision. He noted that the immunity was intended to encourage confidence in the impartiality of prosecutors and the Attorney General, and that the threat of personal liability could have a "chilling effect" on the prosecutor's exercise of discretion. Allowing civil suits, it had been argued, would create a flood of litigation distracting prosecutors from their regular duties.

The Supreme Court rejected these considerations. First, Mr. Justice Lamer suggested that public confidence in the justice system actually suffered from prosecutors enjoying freedom from civil liability, even in the face of abuse of power through a malicious prosecution. Further, he noted that an action for malicious prosecution was not simply a matter of second-guessing the judgment of a prosecutor; rather, "a plaintiff bringing a claim for malicious prosecution has no easy task",¹⁰⁰ and what needed to be proved was "deliberate and malicious use of the office for ends that are improper and inconsistent with the traditional prosecutorial function."¹⁰¹ Given this, he suggested that the "chilling effect" was not likely to appear:

[A]mple mechanisms exist within the system to ensure that frivolous claims are not brought. In fact, the difficulty in proving a claim for malicious prosecution itself acts as a deterrent.¹⁰²

He noted that in Quebec, where the Attorney General and prosecutors have been liable to civil prosecution since 1966, there has been no flood of claims.

Further, Mr. Justice Lamer noted that preventing civil actions against the Attorney General and prosecutors might also act to prevent *Charter* remedies under subsection 24(1). An individual who has been maliciously prosecuted has suffered a deprivation of liberty and

98. This example is similar to the comparison made by Wilson J. in *Operation Dismantle Inc. v. R.*, *supra*, note 90, *e.g.*, where she contrasts the clearly unacceptable practice of "press gangs" with conscription for military service carried out in accordance with appropriate enabling legislation.

99. *Nelles v. Ontario*, [1989] 2 S.C.R. 170.

100. *Ibid.* at 194.

101. *Ibid.* at 196-197.

102. *Ibid.* at 197.

security of the person not in accordance with the principles of fundamental justice. Subsection 24(1) of the *Charter* should guarantee that person access to a court of competent jurisdiction to seek a remedy; immunity from civil liability would prevent that access. He noted this argument to be "a compelling underlying reason for finding that the common law itself does not mandate absolute immunity."¹⁰³

At a minimum, it would seem that the Attorney General's powers must be used in way that is consistent with the *Charter*. However, it has been held that a stay of proceedings does not infringe the complainant's *Charter* rights,¹⁰⁴ and that an accused has no constitutional right to a preliminary inquiry.¹⁰⁵ The extent to which the Attorney General is subject to review short of "flagrant impropriety", therefore, is as yet unclear.

More frequently than they review decisions of the Attorney General, courts review and to a certain extent supervise the actions of the Attorney General's agent, the Crown prosecutor. The Crown prosecutor occupies a unique position in the Anglo-Canadian tradition which has sometimes been described as a quasi-judicial office.¹⁰⁶ Perhaps the best known expression of this concept comes from Mr. Justice Rand:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.¹⁰⁷

Although trial and appellate courts exercise considerable powers to guard against prosecutorial misconduct in the court, as in the presentation of the Crown's case, cross-examination of witnesses, particularly the accused,¹⁰⁸ disclosure to defence,¹⁰⁹ and in closing address,¹¹⁰ the courts have recognized only a limited role in supervising the exercise

103. *Ibid.* at 196. Although Mr. Justice Lamer was writing for the majority, only two others of the six justices rendering the decision concurred with him on this point.

104. *Campbell v. Attorney General of Ontario*, *supra*, note 91.

105. See *Re R. and Arviv* (1985), 19 C.C.C. (3d) 395 (Ont. C.A.), and discussion of this point below at 89, in "Preferred Indictments".

106. See e.g., *Re Forrester and R.* (1976), 33 C.C.C. (2d) 221 (Alta. S.C.T.D.) at 227.

107. *Boucher v. R.*, [1955] S.C.R. 16 at 23-24.

108. *R. v. Logiacco* (1984), 11 C.C.C.(3d) 374 at 383 (Ont. C.A.), per Cory J.A.:

For a Crown prosecutor to deliberately persist in seeking answers to such irrelevant questions will very often lead to such a manifest appearance of unfairness that a new trial will be the inevitable result.

109. *R. v. Savion and Mizrahi* (1980), 52 C.C.C. (2d) 276 (Ont. C.A.).

110. *R. v. Theakston* (1980), 53 C.C.C. (2d) 554 (Ont. C.A.).

of prosecutorial authority outside the courtroom. This can be easily understood in view of the perceived need for independence of both the judiciary and the prosecutor.

The Commission's Working Paper on *Control of the Process*¹¹¹ discussed the distinction between the roles of the Crown and the judiciary. We suggested there that the division of power between the two should rest on a distinction between political and non-political aspects of the administration of justice. In that context, we considered an aspect "political" if

[I]t involves a decision whether or not to enforce a particular law; it involves the question of allocation of resources in terms of money, facilities and personnel; it is an issue amenable to solution according to public opinion of a particular time and place; it is one that subjects the decision-maker to these pressures of public opinion and to the possibility of a sanction, such as accountability to the legislature or the electorate, or dismissal from office.¹¹²

As a general rule, it can be stated that the courts will not intervene in the exercise of prosecutorial authority either in or out of the court unless there has been an abuse of that authority. This may be manifested as an abuse of power, breach of duty, unfairness or injustice to the accused, possible miscarriage of justice, or conduct that brings the administration of justice into disrepute. Thus in rare circumstances a trial judge will require a prosecutor to make additional disclosure to the accused or direct that certain witnesses be called.¹¹³ A trial court may intervene to prevent admission of prejudicial evidence, or abusive cross-examination of an accused. Appellate courts have quashed convictions where the trial is tainted by improper prosecutorial tactics such as appeal to prejudice through an improper jury address.¹¹⁴

The ability to try the accused repeatedly is confined by legal doctrines of double jeopardy.¹¹⁵ The most difficult area to quantify, however, is embraced by the doctrine of abuse of process. In this area there are no hard rules nor easily recognized principles. As well, several elements of the prosecutorial and judicial function make judicial control over prosecutions difficult to reconcile. In the first place the independence of the Attorney General militates against accountability to any other branch of government. Secondly, the traditional function of the judiciary is to determine the guilt or innocence of the accused based on the evidence presented. The judiciary seem ill-equipped to determine what cases ought to be brought before the courts and it might be thought improper for them to be involved in this aspect of the prosecutorial function. As Viscount Dilhorne said in *Director of Public Prosecutions v. Humphrys*:

111. LRC, *Criminal Procedure: Control of the Process*, Working Paper 15 (Ottawa: Information Canada, 1975).

112. *Ibid.* at 33.

113. See e.g., *R. v. Gudbrandson* (1986), 53 C.R. (3d) 20 (B.C. Co. Ct), overturned on another point, (1987) 61 C.R. (3d) 80 (B.C.C.A.).

114. *Pisani v. R.*, [1971] S.C.R. 738.

115. *R. v. B.* (1986), 29 C.C.C. (3d) 365 (Ont. C.A.). The Commission's forthcoming Working Paper *Double Jeopardy, Pleas and Verdicts* discusses the doctrine of double jeopardy more fully.

A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval.¹¹⁶

This statement might be criticized as somewhat simplistic; the fact that a court feels it necessary to intervene to prevent an abuse of its process in one case does not mean that the judicial and prosecutorial functions will become hopelessly blurred in all cases. Nevertheless the cautionary note registered by Viscount Dilhorne does emphasize that the court's role in supervision of the prosecutorial function, through the abuse-of-process doctrine, can only legitimately flow out of the court's need to preserve the integrity of its process. The courts cannot be expected to undertake a more general supervision of the prosecutorial function under the rubric of abuse of process. Clearly the judiciary cannot be expected to exercise a discretion based only on a vague notion of unfairness, but likewise cannot abdicate their "responsibility for seeing that the process of law is not abused."¹¹⁷

After considerable uncertainty in the Supreme Court of Canada and in the lower courts, the Supreme Court has recognized a jurisdiction in trial courts to stay proceedings for abuse of the court's process. In *R. v. Jewitt*, Chief Justice Dickson stated, for the Court:

Lord Devlin has expressed the rationale supporting the existence of a judicial discretion to enter a stay of proceedings to control prosecutorial behaviour prejudicial to accused persons in *Connelly v. Director of Public Prosecutions*, [1964] A.C. 1254 (H.L.) at p. 1354:

"Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or who are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused."

I would adopt the conclusion of the Ontario Court of Appeal in *R. v. Young*, *supra*, and affirm that [at p. 31]:

"there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings."

I would also adopt the caveat added by the Court in *Young* that this is a power which can be exercised only in the "clearest of cases."¹¹⁸

116. [1976] 2 All E.R. 497 at 511 (H.L.).

117. *Connelly v. Director of Public Prosecutions*, [1964] 2 All E.R. 401 at 442 (H.L.) *per* Lord Devlin.

118. [1985] 2 S.C.R. 128 at 136-137.

It would serve no particular purpose to catalogue the various instances where courts prior to *Jewitt* found an abuse of process so serious as to require a stay of proceedings despite the merits of the particular case.¹¹⁹ There are several hundred reported cases in the past twenty years which have considered particular fact situations including the withdrawal and relaying of charges, entrapment, and reneging on an agreement to withdraw charges in exchange for co-operation with the authorities. As former Chief Justice Laskin stated in *Rourke v. The Queen* after reviewing the exercise of the power to stay proceedings in the lower courts:

I have paraded this long list of cases to show how varied are the fact situations in which Judges of different levels and of different Provinces have used abuse of process as a way of controlling prosecution behaviour which operates prejudicially to accused persons. I pass no judgment on the correctness of any of the decisions, but they do indicate by their very diversity the utility of a general principle of abuse of process which judges should be able to invoke in appropriate circumstances to mark their control of the process of their Courts and to require fair behaviour of the Crown towards accused persons.¹²⁰

What these cases do illustrate, however, is that in some instances the prosecutor does not operate fairly, does proceed in circumstances where it is fundamentally unjust to do so, and that courts are capable of addressing these problems.

In summary, then, the actions of the Attorney General are reviewable by the courts, but only in extreme or unusual circumstances. "Flagrant impropriety" on the part of the Attorney General can attract a judicial remedy. The doctrine of abuse of process may apply to provide judicial review of decisions either of the Attorney General personally, or of Crown prosecutors.

E. The Attorney General and the Police

At the time of Confederation and for a considerable period thereafter, the federal Attorney General had responsibility for the national police. Today at the federal level¹²¹ and in some provinces,¹²² responsibility for the police is given to a minister other than the Attorney General, usually, as at the federal level, the Solicitor General.

119. There are many excellent articles on abuse of process. In addition to the discussion in Stenning, *supra*, note 6 at 329ff., see e.g., J. Olah, "The Doctrine of Abuse of Process: Alive and Well in Canada" (1978) 1 C.R. (3d) 341; Morgan, *supra*, note 40; P. Béliveau, J. Bellemare, J.-P. Lussier, *Traité de procédure pénale*, vol. 1 (Montréal: Yvon Blais, 1981) at 49-51; C. Lacerte-Lamontagne, "L'abus de procédure en droit pénal" (1982) 42 R. du B. 69; J.-C. Hébert, "La Charte canadienne et le contrôle de la discrétion ministérielle du Procureur général en droit criminel" (1986) 46 R. du B. 343.

120. [1978] 1 S.C.R. 1021 at 1034.

121. At the federal level, the RCMP are responsible to the Solicitor General. For further discussion of this relationship, see also: Stenning, *supra*, note 23 at 65-97 and A. Grant, *The Police: A Policy Paper*, Study Paper prepared for the LRC (Ottawa: Supply and Services Canada, 1980) at 16-20.

122. The provinces of Nova Scotia, New Brunswick, Quebec, Ontario, Alberta, and British Columbia each have a separate ministry responsible for the supervision of the police. In Quebec, the minister is known as the Minister of Public Security. In each of the other provinces, the minister is called the Solicitor General.

The relationship between the police and the Attorney General or other supervising law officer in Canada is complex. Under our federal structure, both federal and provincial governments have jurisdiction over policing, different ministers are responsible for police in different jurisdictions, and in addition, a number of contractual relationships concerning policing exist between the federal government and several provinces. All of this results in some lack of clarity concerning a relationship that is not well understood or defined in any event.

In England, however, the classic statement of the relationship was made by Lord Denning in *R. v. Commissioner of Police of the Metropolis, Ex parte Blackburn*, where he stated:

I hold it to be the duty of every Commissioner of Police of the Metropolis, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or no suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought. But in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.¹²³

In Canada, cases discussing the independence of the police date back 100 years.¹²⁴ These cases primarily concerned vicarious liability of various levels of government for the acts of the police, finding that such liability did not exist. It has been suggested that these cases show that:

The basis for this non-liability is the status of a constable as a "peace officer" when performing his public duties with respect to the enforcement of the law and the preservation of the peace. When performing such duties, the constable acts not as the servant or agent of the municipality, board or government that appoints him, but as a public officer whose duties are owed to the public at large.¹²⁵

In a recent Ontario case, Crown counsel in remarks to the court discussed the relationship between the Attorney General and the police, attributing the position the Crown was taking to the Attorney General of Ontario. Counsel stated that:

123. [1968] 2 Q.B. 118 at 136 (C.A.). While holding that the police were free of direction from the executive, and had a largely unfettered discretion, Lord Denning did hold that the courts could interfere with some police policy decisions.

124. *Wishart v. City of Brandon* (1887), 4 Man. R. 453 (C.A.); *Rousseau v. La Corporation de Lévis* (1888), 14 Q.L.R. 376 (S.C.). See Stenning, *supra*, note 23 at 101-109 regarding these and other early cases.

125. Stenning, *supra*, note 23 at 109. Stenning also notes that the subsequent case of *Chartier v. Attorney General of Quebec*, [1979] 2 S.C.R. 474 reaches a contrary conclusion on liability, but points out that liability on this ground was not contested in the case.

Constitutional authority in this country, and the United Kingdom, makes it plain that the decision to investigate alleged offences and to lay charges is the *constitutional responsibility* of the police. The Crown Law Office must determine how and when to proceed with the charges once they are laid.¹²⁶

A similar position has been stated by former Prime Minister Trudeau. In 1977, in discussing the relationship between the Solicitor General and the RCMP, the Prime Minister stated that the government was guided by the principle

[T]hat the particular minister of the day should not have a right to know what the police are doing constantly in their investigative practices, what they are looking at, and what they are looking for, and the way in which they are doing it.¹²⁷

These authorities suggest that police in Canada enjoy a position similar to that described by Lord Denning in *Blackburn*. However, there are some indications otherwise.

The police in Canada today are governed by statute. At the federal level and in each province, legislation establishes the powers and duties of police officers.¹²⁸ Typically this legislation makes the police subject to direction from the minister responsible or some other body; for example, section 5 of the *Royal Canadian Mounted Police Act*¹²⁹ notes that the Commissioner of the police shall have the control and management of the force "under the direction of the Minister". Since the powers and status of the police are defined by statute in Canada, this might be taken to indicate that the minister responsible can instruct the police to observe or investigate particular matters.

Further, the *Blackburn* decision has been discussed in Canadian cases, most notably in *Bisaillon v. Keable*.¹³⁰ In that case, the Quebec Court of Appeal distinguished *Blackburn* on the facts from the situation in Quebec. Mr. Justice Turgeon noted that the police in England enjoy great autonomy; in Quebec, they were under the supervision of the Minister of Justice

126. The remarks of Crown counsel are set out in *Campbell v. Attorney General of Ontario*, *supra*, note 91 at 292; emphasis added. The case involved the decision to stay proceedings on abortion charges against Dr. Henry Morgentaler while the Supreme Court of Canada appeal in a previous prosecution concerning the same issue was still pending. It is not clear, as will be discussed shortly, that it is correct to describe the responsibility of the police as a constitutional one.

127. Quoted in Edwards, *Ministerial Responsibility*, *supra*, note 48 at 94. Edwards is critical of this position, holding at 96 that "it treats knowledge and information as to police methods, police practices, even police targets, as necessarily synonymous with improper interference with the day to day operations of a force." However, Edwards does agree with the principle of non-interference in police decision-making.

128. *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10; *The Constabulary Act* (now *The Royal Newfoundland Constabulary Act*), R.S.N. 1970, c. 58; *Police Act*, R.S.N.S. 1989, c. 348; *Police Act*, S.N.B. 1977, c. P-9.2; *Police Act*, R.S.P.E.I. 1988, c. P-11; *Police Act*, R.S.Q. 1977, c. P-13; *Police Act*, R.S.O. 1980, c. 381; *The Provincial Police Act*, R.S.M. 1987, c. P150; *Police Act*, R.S.S. 1978, c. P-15; *Police Act*, S.A. 1988, c. P-12.01; *Police Act*, R.S.B.C. 1979, c. 331.

129. *Supra*, note 128.

130. (1980), 17 C.R. (3d) 193 (Que. C.A.).

(they are now under the Minister of Public Security), who has responsibility for all aspects of the administration of justice in the province. Turgeon J. also suggested that stricter prosecutorial control in Quebec meant that the decision whether to lay charges in that province lay with the prosecutor's office rather than with the police. As a result, he held that *Blackburn* was not applicable in Quebec.

Stenning has been critical of the reasoning in this decision,¹³¹ which appears not to have been followed in other provinces. The *Bisaillon* decision has been overturned by the Supreme Court of Canada, but on other grounds; the Supreme Court declined to address these particular issues, holding that they were not essential to the decision.¹³²

Blackburn was also considered in *Wool v. The Queen*,¹³³ though that case considered a different aspect of *Blackburn*. In *Wool*, a staff sergeant in the RCMP sought to enjoin his Commanding Officer from preventing him from continuing an investigation against a former Minister of Justice of the Yukon. In refusing to grant the injunction, the court held that the Commanding Officer's duty to investigate was owed to "the Crown, or the public at large".¹³⁴ At the same time, the court noted that, due to section 18 of the *Royal Canadian Mounted Police Act*, "whereas the plaintiff has a right to lay an information, that right is not absolute, but subject to the orders of the Commissioner."¹³⁵

On the one hand, then, *Wool* agrees with *Blackburn* that the duty of a police officer to investigate is owed to the public at large, not to the executive. However, the case also affirms that the rights of an officer in this regard can be limited by statute. Presumably, therefore, the rights of a police officer could be made directly subject to control of the executive (as, at least in the case of the RCMP, they arguably now indirectly are¹³⁶) by a simple statutory amendment.

A further factor complicating control over the police is created by the division of powers in the Constitution. Both the federal and provincial governments have enacted legislation concerning police forces within their jurisdiction; nonetheless, in seven of the ten provinces policing is in fact provided on a contract basis by the RCMP.¹³⁷ As a result, in those provinces the same police force is potentially subject to direction from more than one level of government. Litigation has made it clear that generally speaking, the RCMP remain subject

131. Stenning, *supra*, note 23 at 124-126.

132. *Attorney General of the Province of Quebec v. Attorney General of Canada*, [1979] 1 S.C.R. 218.

133. (1985-86) 28 C.L.Q. 162 (F.C.T.D.).

134. *Ibid.* at 166.

135. *Ibid.*

136. Section 18 of the *Royal Canadian Mounted Police Act*, *supra*, note 128, makes each officer, in the performance of duties, "subject to the orders of the Commissioner", while s. 5 of the Act puts the Commissioner "under the direction of the Minister".

137. Ontario, Quebec, and Newfoundland have established separate police forces, though the RCMP also provide police services in Newfoundland.

exclusively to the federal government, but the extent to which provincial governments might have power to direct the RCMP has not been entirely settled.¹³⁸

Police officers are placed within a bureaucratic structure, taking direction from superior officers who, importantly, are responsible for their supervision and discipline.¹³⁹ Their superiors in turn are located within the hierarchy of governmental authority, and are ultimately accountable to a responsible minister. The challenge within such a system is the maintenance of the proper degree of independence consistent with the appropriate measure of accountability.

138. See, e.g., *Attorney General of the Province of Quebec v. Attorney General of Canada*, *supra*, note 132, which decided that a provincial Board of Inquiry did not have the jurisdiction to examine the administration and management of the RCMP. In that case, the inquiry was established by the province of Quebec, which is one of the provinces not served by the RCMP. In *Attorney General of Alberta v. Putnam*, [1981] 2 S.C.R. 267, the Supreme Court considered whether the province of Alberta, which is served by the RCMP, had the jurisdiction under its own *Police Act* to investigate and discipline RCMP officers. The court held that Alberta did not have this power; however, Stenning in *Legal Status of the Police*, *supra*, note 23 at 76 has suggested that the court's reasoning leaves open the possibility that a province might have the power to investigate but not discipline members of the RCMP.

139. *Wool v. R.*, *supra*, note 133.

CHAPTER TWO

The Need for Reform in the Present Law

I. Introduction

Our review of criminal procedure has stressed the need for a principled approach to law reform. The principles to be applied are discussed in depth in *Our Criminal Procedure*.¹⁴⁰ The application of those general principles to the control of prosecutions is a complex task. The Attorney General and, to a lesser extent, the Attorney General's counsel and agents, are entrusted with very broad powers, which are subject to very limited controls. Yet, as one judge has stated, we "cannot conceive of a system of enforcing the law where some one in authority is not called upon to decide whether or not a person should be prosecuted for an alleged offence."¹⁴¹ However, the need for broad powers does not preclude restraint, or that those who exercise the powers be accountable, that the parameters of the powers be clear, and that they be fairly exercised. No one of these principles should be given invariable precedence over the others, and they cannot be enforced so rigorously that the system becomes hopelessly inefficient. The system must also be open to public view and criticism.

We accept the general proposition that the majority of daily decisions involving the use of prosecutorial discretion need not be subject to judicial review, and that, to a considerable extent, the preservation of the high standards demanded of the Attorney General will continue to depend on the personal integrity of the office holder. Nonetheless greater clarity in the nature of the powers of the Attorney General would be achieved if the Crown's common-law powers were codified. The balancing of these principles with the need to provide broad discretionary powers to the Attorney General is the focus of many of our recommendations.

Although the powers of the Attorney General are an important starting point in a consideration of the office, the nature of the office itself, and the mix of responsibilities within it, are also of significance. This area of study has become more important with the advent of the *Charter*. As head of the prosecution staff for the federal government, the

140. LRC, *Our Criminal Procedure*, Working Paper 32 (Ottawa: The Commission, 1988).

141. *R. v. Court of Sessions of the Peace, Ex Parte Lafleur*, [1967] 3 C.C.C. 244 at 248 (Que. C.A.), quoted with approval in *Smythe v. R.*, [1971] S.C.R. 680 at 686.

Attorney General has in several important cases advocated, through counsel, a narrow interpretation of the rights of the individual under the *Charter*, in an apparent attempt to minimize its impact on law-enforcement techniques and prosecutions.¹⁴² On the other hand, the Supreme Court has stated that the *Charter* should receive a "broad and liberal" interpretation,¹⁴³ an approach the Attorney General should adopt when advising on legislation in the role of Minister of Justice.

These same tensions surface when the Attorney General considers the reform of criminal law. Restraint in the intrusion into the lives of individuals must be balanced with the requests of police and prosecutors for "tougher, more effective laws", which ultimately means giving those officials broader powers. We will therefore first consider whether these potentially conflicting roles can best be served by a single ministry, or whether a different division of responsibilities is desirable.

II. The Structure of the Department of Justice and the Department of the Solicitor General

A. The Department of Justice

We have noted that in Canada, the offices of Attorney General and Minister of Justice are combined by statute in one person. This fact is reflected in the structure of the department, and the administrative arrangements that are made for control of the criminal prosecution service.

Below the ministerial level, the Department of Justice is headed by the Deputy Minister of Justice, who is by statute also the Deputy Attorney General. The next most senior officials are three Associate Deputy Ministers, responsible for civil law, for litigation, and for public law.¹⁴⁴

Criminal prosecutions are conducted by the Criminal Law Branch. That branch is headed by an assistant deputy attorney general who reports to the Associate Deputy Attorney General, Litigation. The Litigation Sector also includes branches dealing with civil and tax matters (each headed by an assistant deputy attorney general), and the Chief General

142. See, e.g., *R. v. Hamill*, [1987] 1 S.C.R. 301, where the Attorney General argued in favour of writs of assistance, or *R. v. Smith*, *supra*, note 69, where the Attorney General argued in favour of a minimum seven-year jail term for importation of narcotics.

143. See *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 154-155; and *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357 at 365ff.

144. *Department of Justice Act*, *supra*, note 30, s. 3(2). The information in this section is drawn from: Department of Justice, *Annual Report 1988-1989* (Ottawa: Supply and Services Canada, 1990). A flowchart is attached to this paper as Appendix C, showing the organizational structure of the Department of Justice.

Counsel, who conducts complex litigation which requires counsel of particular seniority and expertise.

Government bills and amendments are prepared by the Legislative Programming Branch, which is under the supervision of the Associate Deputy Minister, Civil Law. However, "Criminal Law Branch counsel are consulted on amendments to the *Criminal Code*, on legislative proposals pertaining to criminal law, and on the development of criminal law policy and programs".¹⁴⁵

It will be seen from this arrangement that the prosecution service does not enjoy any particular structural independence. Rather, it is an integrated part of the department, with each more senior supervisory office being part of the general bureaucracy. In addition, the policy making functions of the Minister of Justice are conducted through the same ministry as the prosecution service, and indeed amendments concerning criminal law are made after consultation with the prosecution service.

It is our suggestion that each of these situations — the lack of independence of the prosecution service, and the combining of the functions of the Minister of Justice and the Attorney General — creates potential difficulties for the proper administration of justice. We shall consider each situation in turn.

1. Dividing the Offices of Minister of Justice and Attorney General

(a) Overview

One major source of concern within the present structure of the Department of Justice is the potential for improper political interference with the prosecution service. This problem will be addressed below. However, other sources of potential difficulty, entirely removed from this issue, also exist.

Generally speaking, these problems arise from the conflicts between the different roles that the combined Minister of Justice and Attorney General is required to fill. In essence, the problem is this: the job of Minister of Justice is primarily a neutral one. The Minister of Justice is legal adviser to the Cabinet, including certifying legislation to be in accordance with the *Charter*,¹⁴⁶ has the primary responsibility for formulating the legal policy of the government, and is responsible for the court system and the administration of justice. These are all tasks that require a completely even-handed approach. However, the same minister, as the Attorney General, is in charge of the prosecution service. This task cannot, despite the Crown prosecutor's duty to act fairly, really be described as a neutral one; rather, the Crown prosecutor is effectively a partisan participant in the administration of justice. When the same department is in charge of both of these functions, therefore, there is inevitably a

145. Department of Justice, *supra*, note 144 at 19.

146. *Department of Justice Act*, *supra*, note 30, as amended by S.C. 1985, c. 26, s. 106.

danger, or at the very least a possible perception, that tasks which should be carried out in an even-handed manner will be influenced by and therefore favour the prosecution.

Consider, for example, the task of certifying legislation to be in accordance with the *Charter*. As noted earlier, the Supreme Court of Canada has made clear that the *Charter* is to receive a "broad and liberal interpretation",¹⁴⁷ and so it is appropriate for the Minister of Justice to take such an approach in considering the validity of legislation. In this role, therefore, the Minister of Justice should be adopting an attitude that preserves and protects individual rights, and should not certify legislation that threatens them.

The Attorney General, on the other hand, is responsible for prosecutions, and in that role would understandably and properly desire tough legislation that assisted law-enforcement purposes. Such legislation could readily pose a threat to the individual rights guaranteed under the *Charter*, and so should be particularly closely scrutinized for validity before being certified. However, when this scrutiny is conducted by the very person most interested in having the legislation passed, there is room for concern that the scrutiny may not be as independent as is desirable.¹⁴⁸

By the same token, the stance taken in litigation by counsel representing the Attorney General is likely to be in conflict with the "broad and liberal" approach required of the Minister of Justice. Since the *Charter* is only applicable when some degree of government involvement exists,¹⁴⁹ counsel for the Attorney General will normally be involved in *Charter* challenges, and normally will be arguing against the challenge. Thus, for example, in *Hunter v. Southam Inc.*,¹⁵⁰ counsel for the Attorney General had argued to uphold the search and seizure provisions of the *Combines Investigations Act*.¹⁵¹ Subsequently counsel for the Attorney General have argued in favour of the validity of writs of assistance,¹⁵² and of a minimum seven-year jail term for the importation of narcotics,¹⁵³ provisions which the

147. See *Hunter v. Southam Inc.*, *supra*, note 143, and *Law Society of Upper Canada v. Skapinker*, *supra*, note 143.

148. Consider, e.g., s. 487.2 of the *Criminal Code*. This subsection, which restricts the type of publicity that can be given to search warrants, was certified by the Minister of Justice. The legislation has since been struck down by lower courts in two jurisdictions as violating the *Charter*: see *Canadian Newspapers Co. v. Attorney-General of Canada*, (1986), 28 C.C.C. (3d) 379 (Man. Q.B.) and *Canadian Newspapers Co. v. Attorney-General of Canada* (1986), 29 C.C.C. (3d) 109 (Ont. H.C.). The Minister chose not to appeal these lower court decisions, but instead opted to treat the legislation as inoperative. This suggests that, after the fact, the Department of Justice considered the legislation anew, agreeing that it violated the *Charter*. It is not clear why the Department did not reach this conclusion before originally certifying the legislation.

149. Section 32 of the *Charter* states that it is applicable "to the Parliament and government of Canada" and "to the legislature and government of each province". The exact limits of the applicability and degree of government involvement necessary to call the *Charter* into play have not been fully determined: see, e.g., *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

150. *Supra*, note 143.

151. R.S.C. 1985, c. C-34.

152. *R. v. Hamill*, *supra*, note 142.

153. *R. v. Smith*, *supra*, note 69.

Supreme Court of Canada found to violate the *Charter*. In practice, the motivation of preserving what are seen to be effective law-enforcement techniques frequently requires counsel for the Attorney General to adopt a different attitude from that of the Minister of Justice, and to argue for a narrow and limited interpretation of the rights guaranteed in the *Charter*.

A different manifestation of this conflict is seen in having the same office responsible for both the prosecution service and legal aid. A significant portion of legal-aid work consists of defending those charged with crimes.¹⁵⁴ Thus, to a large extent, the same law officer is ultimately responsible for both prosecution and defence. In deciding on the allocation of funds or other support services between these two services, then, the Attorney General faces a clear potential for conflict.

Further, the same minister who directs the prosecution arm of the government not only appoints the judges before whom Crown counsel appear, but also negotiates with those judges about questions such as their level of remuneration and pension benefits. At the very least, one must question whether justice appears to be done when the person who selects and pays judges is the chief prosecutor.

Potential for conflict also exists when agents of the Attorney General are required to investigate or prosecute others within the Department of Justice, or associated with it. For example, in the recent ticket-fixing scandal in the province of Manitoba, the police and the Crown office, both under the jurisdiction of the provincial Attorney General, investigated and prosecuted a number of persons, including two Provincial Court judges and one magistrate — all three of whom were part of a court system also administered through the Attorney General's department. As former Manitoba Chief Justice Dewar remarked in his review of the handling of the scandal:

The Criminal Justice Division of the Department of the Attorney-General (the Crown Office) was not the appropriate instrument for exercising Crown prosecutorial independence when the integrity of a court system, organized and administered by that Department, is in question. In the circumstances, given the present organization of the Department, Crown office officials and prosecutors cannot be viewed as independent. This ticket-fixing affair demonstrates a point at which internal conflict arises and independence of the prosecutorial role breaks down.¹⁵⁵

Quite apart from the question of investigating those employed by the same department, the Dewar Report shows instances of other potential conflicts that we have noted arising from having the prosecution service tied too closely to the rest of the Attorney General's department. For example, correspondence quoted in the report shows a concern on the part of the Director of Criminal Prosecutions over a possible conflict in his roles. On the one hand, he was negotiating a plea bargain with counsel for one of the Provincial Court judges.

154. The report of the National Task Force on the Administration of Justice, *Legal Aid Services in Canada 1977-78* [s. 1.]: The Task Force, 1979) at 7-8 noted that in 1977-78, 42% of legal-aid cases were criminal matters, and that the federal government paid 48% of the cost of criminal-related expenditures.

155. *Dewar Review*, *supra*, note 3 at 64.

On the other hand, through his involvement in the Department of Justice, he was involved in discussions that determined whether that same judge would be eligible for particular pension benefits. As Mr. Justice Dewar notes:

Pure expediency influenced the Crown to participate in the plea bargains, and to employ as bargaining leverage an ability to arrange an enhanced pension benefit in one case and continued employment in the other, both being arrangements made by or through the intervention of senior officials in the Department of the Attorney-General, contacted by solicitors for the accused. Crown counsel in both cases recognized an ethical dilemma, but carried on, their independence compromised.¹⁵⁶

Of course, no matter what arrangements are made, there remains the possibility of conflict when the prosecution service is required to investigate itself. In any case where a direct internal conflict of this sort arises, it would remain open to the Attorney General or the Director to appoint outside counsel to handle specific cases, but it is preferable to avoid this type of *ad hoc* arrangement when possible. The greater the extent to which the prosecution service is isolated from the other aspects of the administration of justice, and indeed of the Attorney General's department, the less likely this potential conflict becomes.

The conflict can also be looked at from the other perspective: one could suggest that the Attorney General's duty to represent government departments, not just in criminal but in civil matters, can be compromised by the duty, as Minister of Justice, to consider issues impartially. A department that wished to argue for a broad construction of its statutory powers to conduct searches and effect seizures, for example, might not feel adequately represented by counsel who also has a duty to advocate the least governmental interference with personal liberty that is consistent with the protection of society.¹⁵⁷

Indeed, a situation similar to this arose in *Re Blainey and Ontario Hockey Association*.¹⁵⁸ The plaintiff, a twelve-year-old girl, was suing the Ontario Hockey Association, after the Ontario Human Rights Commission had held that its governing legislation allowed the particular form of discrimination of which she complained, thus preventing it from entertaining her complaint. The Human Rights Commission was also named in the action. In the Court of Appeal, Mr. Justice Finlayson in dissent noted the difficulty faced by counsel for the Commission: she was apparently representing only the Commission, not the Attorney General, though Finlayson J. noted that the Attorney General would have been the appropriate person to have instructed counsel. In addition, although the Commission had relied upon its governing legislation to refuse the plaintiff's complaint, counsel for the Commission agreed that the Attorney General had publicly stated that the governing legislation in question ought to be changed, and indeed argued in the case that the legislation was unconstitutional. Counsel representing the government was therefore placed in the

156. *Ibid.* at 65.

157. In this regard, note the comments of Ian Scott, to the effect that an Attorney General might feel compelled to take a fellow minister to court to prevent an unconstitutional course of action, discussed above at 10.

158. (1986) 54 O.R. (2d) 513 (C.A.).

actions of the commission, based on limitations in the law, but at the same time for policy reasons being opposed to those limitations.¹⁵⁹

There have been recognized instances in which a conflict has been noted between the policy and litigation functions of the Department of Justice. For example, the Canadian Human Rights Commission is under the auspices of the Minister of Justice, reporting to Parliament through that law officer. On more than one occasion, it has been observed that this arrangement creates a potential conflict:

The Minister of Justice is also the Attorney General of Canada and, as such acts for government agencies and departments in any litigation concerning them, including litigation in which they take an adversarial position vis-à-vis the Canadian Human Rights Commission.¹⁶⁰

Despite several internal requests and external recommendations, this arrangement has not been changed.¹⁶¹

Similarly, arrangements concerning the Court Challenges Program, established to fund private challenges to legislation under the *Charter*, has been criticized:

The Court Challenges Program was an important initiative. It helped litigants obtain a number of important judicial decisions in the area of language rights. However, it had a major weakness. The Department of Justice participated in determining who received financial assistance in litigation, yet its own lawyers could be acting for a government

159. In "Law, Policy, and the Role of the Attorney General: Constancy and Change in the 1980s" (1989), 39 U.T.L.J. 109, Ian Scott discusses his involvement in this case as Attorney General. He notes that his department agreed that the section was unconstitutional, and had prepared but not yet had passed by the legislature an amendment.

Scott also notes that the position his department was able to take in that case was made easier by two factors. First, the case was a civil one, dealing with a provincial statute. He notes at 123-124 that a more difficult question arises when a provincial Attorney General forms the opinion that a federal law, such as a section of the *Criminal Code*, is unconstitutional. He notes that he has "not yet formed a clear view based on principle about this issue", but suggests that "it is appropriate for a provincial attorney to pay a significant degree of deference" to the determination of the federal Attorney General.

Second, he notes that in *Blainey* the Cabinet agreed with his advice that the section was unconstitutional. In other cases, he suggests at 126, based on considerations other than those appropriate to the Attorney General, "[t]here is every chance that an attorney general may face the fact that the Cabinet will not accept advice to concede the unconstitutionality of a civil enactment".

160. Canadian Human Rights Commission, *Annual Report 1979* (Ottawa: Supply and Services Canada, 1980) at 15.

161. See, e.g., the annual reports of the Human Rights Commission for 1979, 1980 and 1981. The commission withdrew the request without explanation in its 1983 report. However, two subsequent independent reviews have also recommended that the arrangement be changed; see House of Commons, Special Committee on Participation of Visible Minorities in Canadian Society, *Equality Now! Report of the Special Committee on Visible Minorities in Canadian Society* (Ottawa: Queen's Printer, 1984) and House of Commons, Standing Committee on Justice and Legal Affairs, *Equality for All: Report of the Parliamentary Committee on Equality Rights* (Ottawa: Queen's Printer, 1985).

department involved in that litigation. This put the Department in a position of potential conflict.¹⁶²

Responsibility for the Court Challenges Program has since been handed over to the Canadian Council for Social Development.

(b) Recommendations

The Commission has decided not to make, at this time, any recommendations regarding dividing the functions of Attorney General from those of the Minister of Justice, and creating two separate ministries. It is our opinion that a strong case exists for doing so, but that other issues, particularly in the non-criminal field, need to be considered before any final arrangement can be proposed.

One major reason for splitting the department is the potential prosecutorial bias created by having new legislation prepared and certified by the department which conducts prosecutions. Therefore, if the department were to be split, we suggest that all litigation, both civil and criminal, should be handled by the Attorney General. In addition, we feel it would likely be appropriate for the Attorney General to take on the role of legal adviser to Cabinet and government departments, at least in the context of advising the government of what its obligations are under the existing law. This advisory role would be, we feel, similar to that between any client and counsel.

In drafting new legislation, advising on the appropriate policy for new laws, and certifying the constitutional validity of that legislation, however, in our view the Minister of Justice would be the appropriate person to act. Similarly the Minister of Justice would keep responsibility for court administration and the administration of justice generally, since these are tasks best undertaken by a party not required to appear in those courts. Law reform is also appropriately grouped with these functions. Responsibility for legal aid does not fit neatly with either ministry, but less potential conflict exists when it is placed with the Minister of Justice.

We do not make any final recommendations in this regard for several reasons. First, we acknowledge that making such a major structural change in the office of the Attorney General will have an effect on the role the office-holder can and will play in Cabinet. Some of our consultants have suggested that if there are three law officers in Cabinet (Minister of Justice, Attorney General, and Solicitor General), the influence of each, particularly the former two, will be diminished. There is potential for this to have a detrimental effect on the administration of justice.

In addition, it must be noted that the Attorney General/Minister of Justice also has responsibilities in the non-criminal sphere. All legislation, whether criminal or not, is prepared through the Minister of Justice. All litigation, both civil and criminal, is conducted through the Attorney General. Although splitting the two departments is desirable based on

162. *Equality for All*, *supra*, note 161 at 133.

criminal law considerations, there will be a major impact on the other public-law aspects of the department. Without studying those issues, it would be unwise to propose major structural change. We anticipate that the Commission will return to this issue and make recommendations in this regard in a later Working Paper.

Finally, we feel that we are able to address the problems inherent in the combined office, at least partly, without proposing a division. We have earlier discussed the need for the Crown prosecution service to be insulated from potential political pressure.¹⁶³ For that reason, in the next section we will propose the establishment of an independent office of Director of Public Prosecutions to handle criminal prosecutions. By its very nature, this office will have to be administratively separated from the rest of the Department of Justice. The main purpose of this separation, of course, is to protect the prosecution service from political pressure. Equally, however, establishing this office will serve to create a greater division between the prosecutorial and policy-making segments of the ministry. We expect that this separation will have a salutary effect on the potential conflicts we have noted.

2. An Independent Prosecution Service

(a) Overview

The holder of the combined office of Minister of Justice and Attorney General is a member of Cabinet. We have discussed earlier the principle that political considerations should not normally play a role in prosecutorial decisions; this principle could lead some to suggest that the Attorney General should not be a member of Cabinet at all. As the recent suggestions of interference made by the former Attorney General of British Columbia on his resignation show, there is a potential for improper interference with prosecutorial discretion when the head of the prosecution service is actively involved in the political process. It is necessary to strike a delicate balance in which the need for political independence on the part of Crown counsel is recognized, and yet accountability is not sacrificed.

It would be instructive in this regard to consider the institutional arrangements in other jurisdictions concerning the prosecution of offences. These jurisdictions have also wrestled with the problems of independence and accountability, reaching a variety of solutions. What might be considered the traditional model is that of England and Wales. The systems established in the Republic of Ireland and the State of Victoria in Australia show the extreme end of structural independence for the prosecution service, while those of New Zealand and the Commonwealth of Australia have relatively few, if any, institutional guarantees of independence.¹⁶⁴

163. See "The Attorney General and Parliament" above at 8.

164. A summary of this information in form of a chart follows this paper as Appendix D.

In addition, we shall also consider structural arrangements which have been made in Canada for offices that have a similar need for independence from government interference: the Auditor General, and the Human Rights Commission.

(i) *Institutional Arrangements in Other Countries*¹⁶⁵

(A) *England and Wales*

The institutional arrangements of all the various office-holders in Great Britain concerned with criminal matters are considered in Appendix A. Here, only the responsibilities of the Attorney General and Director of Public Prosecutions need be considered.

Formal responsibility for criminal prosecutions is given to the Attorney General, who has the power to take over private prosecutions, and to terminate them through the *nolle prosequi* power. The Attorney General is not a member of Cabinet, and by tradition may consult with, but must not be directed by, Cabinet in making decisions about prosecutions.

Serious criminal offences are generally prosecuted through the office of the Director of Public Prosecutions. The office was originally created under the *Prosecution of Offences Act, 1879*.¹⁶⁶ However, until 1985 the Director was responsible for only a small percentage of the total number of criminal prosecutions in England, with the great majority being handled by counsel briefed by local chief constables.¹⁶⁷ This situation changed with the passage of the *Prosecution of Offences Act, 1985*.¹⁶⁸ The Office of Director of Public Prosecutions is created by the statute, which calls for the Director to be appointed by the Attorney General, and paid a salary determined by the Attorney General with the approval of the Treasury,¹⁶⁹ and pension benefits arranged individually with the Treasury (unless the Director is appointed from within the Civil Service).¹⁷⁰ The Director of Public Prosecutions is head of the Crown Prosecution Service, which is responsible for all non-private prosecutions throughout England and Wales (though the laying of informations remains in private hands, and private prosecutions are still allowed). The Director is appointed not for a specific term, but until retirement: however, the Director is subject to the normal terms and conditions governing civil servants, and so could be removed from office for inefficiency

165. The information in this discussion is primarily drawn from the work of J.L.J. Edwards, and in particular his writing for the Royal Commission on the Donald Marshall, Jr., Prosecution, *Walking the Tightrope of Justice*, vol. 5 (Halifax: The Royal Commission, 1989).

166. (U.K.), 42-43 Vict., c. 22.

167. A. Sanders, "The New Prosecution Arrangements — (2) An Independent Crown Prosecution Service?" [1986] *Crim. L.R.* 16 at 16.

168. (U.K.), 1985, c. 23.

169. *Ibid.*

170. Private communication with the Law Reform Commission by Roger K. Daw, Policy and Information Division, Director of Public Prosecutions (U.K.), 15 December 1989.

or for falling foul of the law or normal rules of conduct.¹⁷¹ Nonetheless, the Director has a certain measure of independence with regard to staffing the Crown Prosecution Service: the Director makes the appointments, with the approval of the Treasury as to numbers.¹⁷²

In fulfilling these duties the Director is not independent. Subsection 3(1) of the 1985 Act notes, as did earlier versions, that

The Director shall discharge his functions under this or any other enactment under the superintendence of the Attorney General.

The nature of this superintendence has been explained by Sir Michael Havers, former Attorney General of Great Britain, as meaning that:

My responsibility for superintendence of the duties of the Director does not require me to exercise a day-to-day control and specific approval of every decision he takes. The Director makes many decisions in the course of his duties which he does not refer to me but nevertheless I am still responsible for his actions in the sense that I am answerable in the House for what he does. Superintendence means that I must have regard to the overall prosecution policy which he pursues. My relationship with him is such that I require to be told in advance of the major, difficult, and, from the public interest point of view, the more important matters so that should the need arise I am in the position to exercise my ultimate power of direction.¹⁷³

It would therefore be open to the Attorney General to instruct the Director to take over proceedings that have been privately commenced, but then offer no evidence. Equally, the Attorney General could instruct the Director to institute particular proceedings.

Under section 9 of the Act, the Director is required to present an annual report to the Attorney General, who must in turn present that report to Parliament and cause it to be published. Among other things, that report must contain any changes to the Code for Crown Prosecutors, which gives general guidelines concerning whether to initiate charges, whether to discontinue charges, and so forth.

The independence of Crown counsel from political influence is protected for the most part, but nevertheless significantly, by tradition. The actual prosecutors are protected by virtue of the relative independence of their immediate superior, the Director. It is understood by the parties involved that the Attorney General will not normally interfere with the Director's management of the office, or the handling of particular cases. If this should occur, it is understood that the Attorney General will not act from partisan political motives, and

171. *Ibid.*

172. *Prosecution of Offences Act, 1985, supra*, note 168, s. 1(2).

173. Edwards, *Attorney General, supra*, note 34 at 48-49.

that the Cabinet will not attempt to dictate the appropriate course of action to the Attorney General.¹⁷⁴

(B) *The Republic of Ireland*

The office of Attorney General is established in the constitution of the Republic of Ireland. The Attorney General is the adviser to the government on matters of law and is responsible for the prosecution of crimes and offences other than summary conviction matters. Although a political appointment, the Attorney General does not sit as a member of Cabinet, and is not required to hold a seat in the Irish House (Dáil). The Attorney General's independence is further stressed by the rule of the Dáil that, even if a member, the Attorney General cannot be called upon in the House to justify the handling of particular prosecutions; rather, such questions are handled by the Prime Minister (Taoiseach) or Parliamentary Secretary.¹⁷⁵

Since the *Prosecution of Offences Act, 1974*,¹⁷⁶ the office of Director of Public Prosecutions has also existed. The Director is a civil servant, appointed by the government.¹⁷⁷ However, the appointment is made based on recommendations from a committee of five people, including, for example, the Chief Justice, and the Chairman of the General Council of the Bar of Ireland.¹⁷⁸ The terms and conditions of employment, including superannuation benefits, are determined by the Taoiseach on consultation with the Minister for the Public Service.¹⁷⁹ Although the Director has charge of the prosecution service, the statute reserves to the Taoiseach the power to appoint the officers and servants of the Director.¹⁸⁰

Subsection 3(1) of the Act states that the Director "shall perform all the functions capable of being performed in relation to criminal matters. . . by the Attorney General". Subsection 2(5) notes that "The Director shall be independent in the performance of his functions." There is a requirement under subsection 2(6) of the Act for the Attorney General and Director of Public Prosecutions to consult from time to time concerning the functions of the Director, but this does not give the Attorney General any right to give directions to

174. Stenning points out in *Appearing for the Crown, supra*, note 6 at 293ff. that the Attorney General's accountability to Cabinet is problematical at best, in that there may be no actual obligation for the Attorney General to report to Cabinet. Equally, the accountability of the Attorney General to the legislature is limited to being questioned in the House, generally after the fact, concerning particular decisions. Stenning notes at 305 that there has been no instance of an English Attorney General resigning or being dismissed due to parliamentary criticism, and suggests that any vote on such an issue would follow party lines, effectively protecting the Attorney General.

175. Edwards, *Attorney General, supra*, note 34 at 267 n. 47.

176. (Eire), No. 22.

177. *Ibid.*, ss. 2(2) and 2(4).

178. *Ibid.*, s. 2(7).

179. *Ibid.*, s. 2(8).

180. *Ibid.*, s. 2(11).

the Director.¹⁸¹ Indeed, the independence of the Director is stressed by subsection 6(1) of the Act, which prohibits communication with the Director's staff or the Director for the purpose of influencing pending criminal proceedings.

There are a few restrictions on the Director. Responsibility for authorizing prosecutions under certain Acts (the *Geneva Conventions Act 1962*, the *Official Secrets Act 1963*, and the *Genocide Act 1973*) remains with the Attorney General, as does defending against challenges to the constitutional validity of laws. However, these limitations do not amount to control over the Director; they merely reserve some tasks to the Attorney General. The Director remains independent in performing all those tasks attached to the office.

However, subsection 5(1) of the Act allows the government to transfer individual cases to the Attorney General if it is necessary in the interests of national security. This seems unlikely to be a power that will interfere with the Director's day-to-day handling of the department; nonetheless it is a residual form of control in the hands of the government. At least in cases that concern national security, the Director will be aware that control of a case can be taken away if the government disagrees with the proposed course of action.

There are further safeguards for the independence of the Director, found in the procedures for filling the office or removing the incumbent. The Director is appointed by the Taoiseach, but on the recommendation of a committee consisting of the Chief Justice, the Chairman of the General Council of the Bar of Ireland, the President of the Incorporated Law Society, the Secretary to the Government, and the Senior Legal Assistant in the Office of the Attorney General. The Director can be removed by the Dáil, but it must have before it a report of a committee consisting of the Chief Justice, a Judge of the High Court, and the Attorney General. No specific grounds for removal are set out; the statute only notes that the committee can investigate "the condition of health, either physical or mental, of the Director" or "inquire into the conduct (whether in the execution of his office or otherwise) of the Director, either generally or on a particular occasion".¹⁸²

In the Irish system, then, there is little control by the government or Attorney General over the prosecution service, and there are considerable institutional protections for the independence of that service. Only in limited circumstances can cases be taken from the Director, and in those circumstances they are transferred to the Attorney General. Since the Attorney General is equally considered to be independent of Cabinet, even this would seem to give the government as a whole little say.

Indeed, it has been questioned whether the degree of independence is not so great as to eliminate any real accountability for the prosecution service:

With complete independence being conferred upon the Director of Public Prosecutions in Ireland and the elimination of any power or control over the Director's actions by the

181. In *Attorney General*, *supra*, note 34 at 265, Edwards cites an explanatory memorandum issued by the Irish government to this effect.

182. *Prosecution of Offences Act, 1974*, *supra*, note 176, s. 2(9).

Attorney General, who, it may well be asked, is accountable to the Irish Parliament for the decisions taken by the Director of Public Prosecutions? If the experience of other Commonwealth countries, which have adopted into their constitutions a similar model of an unaccountable public prosecutor, is any pointer to what lies in store for the Republic of Ireland it is only a matter of time before the fundamental questions of control and accountability force themselves before its elected Parliament for intense debate.¹⁸³

In opposition to this view, however, it has been suggested by an Irish commentator that the system reflects a conscious adoption of the principle of an unaccountable public prosecutor, and that there has been "general satisfaction with the operation of the constitutional principle which this country has adopted."¹⁸⁴

(C) *State of Victoria, Australia*

The Attorney General's office is created in the constitution of the state of Victoria, which requires that the Attorney General be a member of Cabinet.

As in England, however, the prosecution service is not under the direct control of the Attorney General. Rather, it is administered through the office of the Director of Public Prosecutions, which was created by the *Director of Public Prosecutions Act 1982*.¹⁸⁵

The Director is appointed by the Governor in Council.¹⁸⁶ The Director's office prepares, institutes, and conducts all criminal proceedings on behalf of the Crown in the High Court, Supreme Court, and County Court, conducts preliminary inquiries, and has the authority to take over proceedings in any summary offence.¹⁸⁷ The Director has the same power as the Attorney General to enter a *nolle prosequi* in criminal proceedings, though the Attorney General also retains that power.¹⁸⁸ The Director is "responsible to the Attorney-General for the due performance of his functions under this Act", but this responsibility does not "affect or derogate from the authority of the Director in respect of the preparation institution and conduct of proceedings under this Act".¹⁸⁹

By this scheme, Victoria has created a Director of Public Prosecutions with virtually complete structural independence. The purpose of this arrangement is to insulate the Director from any control by the Attorney General, and thereby guarantee that the Director's decisions are made without reference to political considerations that might be feared to motivate the Attorney General.

183. Edwards, *Attorney General*, *supra*, note 34 at 267-268.

184. D. Costello, Book Review of *The Attorney General, Politics, and the Public Interest* by J.L.I.J. Edwards (1985) 20 *The Irish Jurist* 223 at 224.

185. (Victoria, Australia) no. 9848/1982.

186. *Ibid.*, s. 3(1).

187. *Ibid.*, s. 9(1).

188. *Ibid.*, s. 14.

189. *Ibid.*, s. 9.

This insulation from influence is supported by other arrangements concerning the Director of Public Prosecutions. The Director has responsibility for selecting staff and controlling the budget of the Office.¹⁹⁰ The office-holder is appointed until the age of 65, receives the salary and pension benefits of a puisne judge of the Supreme Court, and is not subject to the provisions of the *Public Service Act 1974*.¹⁹¹ The Director may be suspended by the Governor in Council; if the Director is suspended, a full statement of the grounds must be presented by the Attorney General to Parliament within seven days (or, if the House is not sitting, within seven days of the start of the next session). If Parliament does not within seven days from that report pass a resolution for the removal of the Director, then the suspension is lifted. This is the only mechanism for the removal of an incumbent Director.¹⁹²

The independence of individual prosecutions is further protected by restrictions on the Director's involvement at that level. The Director is entitled to furnish general guidelines to prosecutors, police, or other persons: however, "the Director is not entitled to furnish guidelines in relation to a particular case."¹⁹³ In addition, any guidelines which are issued must be published in the *Government Gazette*.¹⁹⁴

The Victoria model is at the extreme end of independence in the prosecution of criminal offences. As with the Republic of Ireland, therefore, it is arguable that little room has been left for accountability. Further, even more than in the United Kingdom, it is open to the government, and indeed the Attorney General, to disavow responsibility for any unpopular or unwise decisions. The Attorney General has no power to influence particular prosecutions, for proper or improper motives. The Director is similarly limited. The government is not responsible for the actions of the Director, beyond having made the initial appointment, and so at no level above the individual prosecutor is there anyone who can effectively be held accountable.

(D) *Commonwealth of Australia*

The office of Attorney General was created in the *Commonwealth of Australia Constitution Act* (1900),¹⁹⁵ to head the Department of the Attorney General. The office-holder is required to be, or within three months to become, a Senator or Member of the House of Representatives. The Attorney General is not excluded from the Cabinet, but at the same time is not necessarily a member. The office is sometimes, but not always, combined with that of Minister of Justice.¹⁹⁶

190. Private Communication with the Law Reform Commission by John Coldrey, Q.C., Director of Public Prosecutions (Victoria), 14 March 1990.

191. *Director of Public Prosecutions Act 1982*, *supra*, note 185, ss. 4, 6.

192. *Ibid.*, s. 5. The statute does not set out any specific grounds for removal, and none have otherwise been established: private communication from John Coldrey, *supra*, note 190.

193. *Director of Public Prosecutions Act 1982*, *supra*, note 185, s. 10(1).

194. *Ibid.*, s. 10(2).

195. (U.K.), 63 & 64 Vict., c. 12.

196. Edwards, *Attorney General*, *supra*, note 34 at 367.

As in other jurisdictions, control of prosecutions has been placed in the hands of a Director of Public Prosecutions, an office created by the *Director of Public Prosecutions Act 1983*.¹⁹⁷ The Director is appointed by the Governor General, and is paid remuneration determined by the Remuneration Tribunal.¹⁹⁸ The staff of the Director's office are appointed under the *Public Service Act 1922*, with the Director having the powers of a permanent head under that Act.¹⁹⁹

The Attorney General has retained the ability to be involved in the prosecution service, either through general guidelines, or in dealing with individual cases. Subsection 8(1) of the Act states that:

In the performance of the Director's functions and in the exercise of the Director's powers, the Director is subject to such directions or guidelines as the Attorney-General, after consultation with the Director, gives or furnishes to the Director by instrument in writing.

Subsection 8(2) of the Act continues that:

Without limiting the generality of sub-section (1), directions or guidelines under that sub-section may —

- (a) relate to the circumstances in which the Director should institute or carry on prosecutions for offences;
- (b) relate to the circumstances in which undertakings should be given under sub-section 9(6); and
- (c) be given or furnished in relation to particular cases.

However, although the Attorney General can require the Director to act in a particular manner in a particular case, steps are taken to prevent the abuse of this power. Subsection 8(1) required any directions to be in writing. Subsection 8(3) of the Act states that:

Where the Attorney-General gives a direction or furnishes a guideline under sub-section (1), he shall —

- (a) as soon as practicable after the time that is the relevant time in relation to the instrument containing the direction or guideline, cause a copy of the instrument to be published in the *Gazette*; and
- (b) cause a copy of that instrument to be laid before each House of the Parliament within 15 sitting days of that House after that time.

197. (Australia), no. 113/1983.

198. *Ibid.*, ss. 18, 19.

199. *Ibid.*, s. 27.

The Act also contains provision for publication to be delayed where the interests of justice require.²⁰⁰

As in other jurisdictions, the Director is a statutorily protected appointee, enjoying greater security of tenure than would a civil servant. The Director is appointed by the Governor General for a specific term not to exceed seven years, but is eligible for reappointment.²⁰¹ There are grounds for removal before that time, some of which make removal possible, while others make it compulsory; the Governor General may terminate the appointment of a Director for "misbehaviour or physical or mental incapacity", and must terminate the Director's appointment in certain events, such as bankruptcy or engaging in outside employment.²⁰² Pension arrangements, however, are not specifically designed to give the Director greater independence than a civil servant enjoys. The Director, if appointed from within the civil service, would continue to be covered by the civil service superannuation plan: Directors appointed from outside may join the civil service superannuation plan, or make other pension arrangements.²⁰³

Clearly, this model takes a very different approach from those of Victoria or Ireland. The Director of Public Prosecutions has charge of the prosecution service, and directs its day-to-day operations. However, the Attorney General retains the ability to direct the Director of Public Prosecutions, not only in general terms, but concerning individual cases. Thus there is direct accountability by the Director to the Attorney General, by virtue of this control over the Director. This control has been praised as a necessary residual measure, if the office of Attorney General is not to become an empty shell, "incapable of discharging in full the obligations associated with the doctrine of ministerial responsibility."²⁰⁴

The Attorney General is also publicly accountable for actions taken with regard to the prosecution service. This accountability is provided by the requirements surrounding directives. Since such directives must be in writing, and must be both published and presented to the House, any direct involvement by the Attorney General will come to light. The Attorney General will therefore be held accountable both to the House and to the general public.

200. *Ibid.* ss. 8(4), 8(5). Since the office of Director was established, only one direction has been issued by the Attorney General, and it was at the Director's request. Until recently, only the Attorney General, and not the Director, had the ability to lay an *ex officio* information without a prior committal hearing, or despite a discharge at that hearing (similar to the power in s. 577 of the *Criminal Code*), and only the Attorney General could give an undertaking that an accomplice would not be prosecuted in exchange for that person's testimony. However, "with the most recent amendments to the *DPP Act* these powers have now been given to the Director, and as a matter of practical reality there is no longer any need for the Attorney General to involve himself in any aspect of the prosecution process": private communication with the Law Reform Commission by J.W. McCarthy, Senior Assistant Director, Commonwealth Director of Public Prosecutions, 15 December 1989.

201. *Director of Public Prosecutions Act 1983*, *supra*, note 197, s. 18.

202. *Ibid.*, s. 23.

203. Private communication with the Law Reform Commission by J.W. McCarthy, *supra*, note 200.

204. J.L.J. Edwards, "The Charter, Government and the Machinery of Justice" (1987) 36 U.N.B.L.J. 41 at 56.

(E) *New Zealand*

In New Zealand's early history, various institutional experiments were tried in organizing the Attorney General's office. In 1866, the office of Attorney General was changed from a political appointment to a non-political, permanent appointment. The legislation was amended by the *Attorney-General's Act, 1876*²⁰⁵ to allow the possibility of the Attorney General's being a member of Parliament. In fact, the Attorney General has been a member of Parliament since that time. Traditionally, though not by statute as in Canada, the Attorney General has also acted as Minister of Justice, and so has been a member of Cabinet.²⁰⁶

The Attorney General is nominally responsible for the prosecution of criminal offences. What has actually occurred, however, is that this function has been taken over by the Solicitor General. This office was in 1875 made into a permanent non-political appointment; its powers were not determined by statute, but the Supreme Court of New Zealand ruled in 1875 that the Solicitor General had the duties traditionally held by the Solicitor General in England.²⁰⁷ In addition, New Zealand's *Interpretation Act* has stated since 1924 that the Solicitor General has all the powers, duties, authority, and functions of the Attorney General.

More important than the institutional arrangements, however, is the way in which the roles of the Attorney General and Solicitor General have developed. It has come to be accepted that the Solicitor General is the chief legal adviser to the government, despite being junior to the Attorney General. The Solicitor General is in charge of the Crown Law Office, which is responsible for handling prosecutions in the Supreme Court and Court of Appeal as well as for providing legal opinions to the Government. The Attorney General is nominally, and indeed in fact, superior to the Solicitor General, but there has traditionally been deference by the Attorney General to the legal opinion of the Solicitor General.²⁰⁸

Despite the fact that there is no office of the Director of Public Prosecutions, something very similar has evolved. What in effect exists in New Zealand is an independent prosecution service, in which it is accepted that the Attorney General should play no role. The day-to-day operations of the service, as well as the provision of legal opinions and advice, are the responsibility and largely unhindered domain of the Solicitor General. Although the Attorney General is not prevented from giving directions to the Solicitor General, or required to make public any directions, in practice no such involvement by the Attorney General takes place.²⁰⁹

205. (N.Z.), 40 Vict., c. 71.

206. Edwards, *Attorney General*, *supra*, note 34 at 390.

207. *Solicitor General ex relatione Cargill v. The Corporation of the City of Dunedin* (1875-1876), 1 N.Z. Jur. (N.S.) 1.

208. Edwards, in *Attorney General*, *supra*, note 34, notes at 393 that the only recorded instances of disagreement between the two office holders are in 1918-1919, when the Attorney General gave instructions to the Crown prosecutors that were contrary to the wishes of the Solicitor General.

209. *Ibid.* at 391-394.

In this case, of course, what protects the independence of the prosecution service is tradition alone. The Solicitor General's office does not exist by statute, and there is no structural independence. This means that the possible danger is not a lack of accountability, but an excess of control. As Edwards has noted:

Other considerations that bear on the sensitive nature of this relationship, in which the junior partner, as it were, generally exercises *de facto* authority, must include the relative years of experience in office that each of the Law Officers can draw upon, the individual personalities and the strength of commitment that each is prepared to invest in their respective constitutional roles. As often as not the focus for any possible divergence of approach between the Attorney General and the Solicitor General will concern the degree of influence that political considerations should exert on the decision to institute or to terminate criminal proceedings. In interpreting where the balance of public interests should fall it should not occasion too much surprise if the Law Officers, with their different perspectives, should sometimes disagree.²¹⁰

(ii) *Independent Canadian Offices*

If new administrative structures are to be established, it is preferable that they fit harmoniously into the Canadian context. It would also be useful to consider some Canadian officials who fill similarly independent roles to a director of public prosecutions. We shall therefore consider briefly some aspects of the arrangements concerning the Auditor General and the Chairman of the Human Rights Commission.

The office of Auditor General is created in the *Auditor General Act*.²¹¹ The Auditor General is appointed by the Governor in Council for a term of ten years, or until age 65, and no re-appointment is possible²¹². The Auditor General can be removed by the Governor in Council, on address of the Senate and the House. No specific grounds for removal are set out, but the Auditor General holds office during "good behaviour".²¹³

The Auditor General is paid the salary of a puisne judge of the Supreme Court. Pension benefits are established in accordance with the *Public Service Superannuation Act* or the *Diplomatic Service (Special) Superannuation Act*, at the Auditor General's option.²¹⁴

The staff of the Auditor General's office are appointed under the *Public Service Employment Act*.²¹⁵ However, the Auditor General has the powers of appointment of a Public Service Commissioner, and the power of the Treasury Board regarding personnel

210. *Ibid.* at 393-394.

211. R.S.C. 1985, c. A-17.

212. *Ibid.*, s. 3.

213. *Ibid.*

214. *Ibid.*, s. 4.

215. *Ibid.*, s. 15.

management and employer-employee relations, which provides the department with a measure of independence in staffing.²¹⁶

The Human Rights Commission is established by the *Canadian Human Rights Act*,²¹⁷ which calls for from five to eight commissioners to be appointed, including the Chief Commissioner.²¹⁸ The Chief Commissioner is appointed by the Governor in Council for a term of up to seven years, with eligibility for reappointment.²¹⁹ The Chief Commissioner can be removed by the Governor in Council "on address of the Senate and the House of Commons". Once again, no specific grounds for removal are set out, beyond that the Chief Commissioner holds office during good behaviour.²²⁰

The salary of the commissioners is set by the Governor in Council,²²¹ and no provision concerning pensions is made in the statute.

The staff of the Human Rights Commission are appointed under the *Public Service Employment Act*,²²² with no special provisions to guarantee independence being made.

(iii) *The Need for Change in Canada*

In determining any new system to recommend for Canada, it would be well to recall the principles that were earlier suggested to be important. First, political considerations should normally have no place in individual prosecutorial decisions. Next, in those circumstances in which political considerations in the broad sense do arise, partisan motives, based on the political consequences to the Attorney General or the government of the day, must not prevail. One method of trying to achieve this is through the independence of the Attorney General from Cabinet, but what is most important is a clear understanding of, and adherence to, the principle of non-partisanship by the decision-maker.

Further, the distinction between partisan and non-partisan political considerations cannot always be drawn clearly. In such circumstances, public opinion must act as the arbiter, and the measure of accountability that one has acted not selfishly, but in the public interest.

It is also instructive to note the wide range of models that has been found to operate satisfactorily in other countries. Systems that incorporate an extreme degree of institutional independence, as well as those with virtually no structural independence, both seem to be capable of producing an apparently unbiased prosecution service. It can be argued that what

216. *Ibid.*, ss. 15(3), 16.

217. R.S.C. 1985, c. H-6.

218. *Ibid.*, s. 26(1).

219. *Ibid.*, ss. 26(3), 26(5).

220. *Ibid.*, s. 26(4).

221. *Ibid.*, s. 30.

222. *Ibid.*, s. 32.

is crucial, therefore, are not the institutional arrangements, but rather adherence to the proper governing principles. As Edwards has stated:

I am convinced that, no matter how entrenched constitutional safeguards may be, in the final analysis it is the strength of character, personal integrity and depth of commitment to the principles of independence and the impartial representation of the public interest, on the part of holders of the office of Attorney General, which is of supreme importance. Such qualities are by no means associated exclusively with either the political or non-political nature of the office of Attorney General.²²³

This should not be taken to mean, however, that it makes no difference what system is adopted. Rather it suggests that an important feature of any system is that failure to adhere to these proper principles should come readily to light. This will further enhance the accountability of any parties involved.

(b) Recommendations

1. To ensure the independence of the prosecution service from partisan political influences, and reduce potential conflicts of interest within the Office of the Attorney General, a new office should be created, entitled the Director of Public Prosecutions. The Director should be in charge of the Crown Prosecution Service, and should report directly to the Attorney General.

2. The Director of Public Prosecutions should not be a civil-service appointment. The Director should be appointed by the Governor in Council, and chosen from candidates recommended by an independent committee.

3. The Director should be appointed for a term of ten years, and should be eligible to be reappointed for one further term.

4. The Director should be removable before the expiry of a term. The grounds for possible removal should be misbehaviour, physical or mental incapacity, incompetence, conflict of interest, and refusal to follow formal written directives of the Attorney General.

5. The Director should only be removable by a vote of the House of Commons, on the motion of the Attorney General, following a hearing before a Parliamentary committee.

6. The Director should be paid the same salary and receive the same pension benefits as a judge of the Federal Court of Canada.

7. The Attorney General should have the power to issue general guidelines, and specific directives concerning individual cases, to the Director. Any such guidelines or

223. *Attorney General, supra*, note 34 at 67.

independence, and the public perception of the independence, of Crown counsel. In addition, removing direct control over prosecutions from the Attorney General will help create a division of responsibilities which lessens the apparent conflict which now exists when a single minister, exercising the dual roles of Attorney General and Minister of Justice, acts as both the legal adviser to the government and the head of the government's litigation team.²²⁴ Further, placing control in the hands of a person with security of tenure, who will not change as each government does, will provide greater continuity to the prosecution service.

The Director, who will be a lawyer, will have charge of the criminal prosecution service, and report directly to the Attorney General. The Director will not be a civil servant, but rather should be appointed by the Governor in Council. With regard to appointments, we propose adopting the approach of the Republic of Ireland, which is similar to the manner in which judicial appointments are made in Canada.²²⁵

We recommend that a special committee should be created to recommend to the Governor in Council appropriate candidates for the post of Director. The power of appointment will remain with the Governor in Council, but they will select from a short list of candidates recommended by the committee. We are not proposing at this time the precise candidates for the committee; however, we envision that it should be similar in make-up to the Irish model, which consists of the Chief Justice of the Supreme Court, the Chairman of the General Council of the Bar of Ireland, the President of the Incorporated Law Society, the Secretary to the Government, and the Senior Legal Assistant in the Office of the Attorney General.²²⁶

The term of office must be appropriate. We favour a fixed term, as in the Commonwealth of Australia, rather than leaving the term unspecified, or to be set with each new Director. However, if the term is too short, and reappointment is not allowed, then no advantages are gained through continuity of administration. Similarly, if reappointment is possible, too short a term may create the perception that a Director must please the government of the day, particularly shortly before the term expires, in order to retain the job. On the other hand, too long a term — appointment for life, like a judge, or as in the state of Victoria, for example — will tend to make the Director less accountable

224. See the earlier discussion of this issue at 35 in "Dividing the Offices of Minister of Justice and Attorney General".

225. Recent reforms introduced by the federal Minister of Justice require that candidates for judicial appointments first be assessed as "qualified" or "not qualified" by a committee in the province in which the appointment is to be effective. The committee consists of a nominee of the provincial or territorial law society, a nominee of the provincial or territorial branch of the Canadian Bar Association, a puisne judge of a federally appointed court, a nominee of the provincial Attorney General or territorial Minister of Justice, and a nominee of the federal Minister of Justice.

226. *Prosecution of Offences Act, 1974, supra*, note 176, s. 2(7)(a)(i).

We propose that the term of office be ten years, and that the Director be eligible for reappointment to a second term. We do not believe that the benefits from continuity of administration justify continuing any one person in the job beyond twenty years.

Because reappointment will be possible, it is necessary to take steps limiting any incentive for the Director to act, or be perceived as acting, to please the government toward the end of term. In part, this can be achieved through the salary and pension provisions that are made.

With regard to salary, we propose adopting an approach similar to the Australian state of Victoria, and to the present Canadian arrangements for the Auditor General. Rather than leaving the salary to be set by the government, or negotiated with each incumbent, the Director will be paid the same salary as a judge of the Federal Court. The advantages of this approach have been pointed out by a Director of Public Prosecutions in Victoria, where the Director is paid the salary of a Supreme Court judge:

The creation of independence, both in fact and in appearance, has been achieved by according the Director of Public Prosecutions the status of a Supreme Court Judge. Apart from the inviolability of tenure a further advantage accruing from this situation is that any subsequent appointment of a Director as a Judge of the Supreme Court of Victoria involves a lateral transfer of duties and interests thus effectively nullifying any temptation to use the position of Director as a stepping stone in a career dependent for advancement upon future Government approval. A tangential benefit of investing the Office with judicial prestige is that the decisions of a Director are more readily accepted by the community.²²⁷

We would further adopt that approach by providing the Director with the same pension entitlement as a judge of the Federal Court. Providing this guarantee to the Director will make the incumbent less dependent on reappointment, and therefore more able to act independently.²²⁸ The fact that such pension benefits are available is from the point of view of the government, and cost efficiency, a factor which favours keeping an incumbent in office.

These various guarantees of independence will be undermined, of course, if removal of a Director prior to the completion of a term is easily arranged. If removal is too easy, the Director may have, or at least be perceived to have, a motivation to please the government of the day, and therefore be insufficiently independent. Of course, not to allow for the

227. J. Coldrey, in a paper presented at a conference on reform of the criminal law, held at the Inns of Court, London, July 1987, and quoted in Royal Commission on the Donald Marshall, Jr., Prosecution, *supra*, note 165 at 47.

228. Some adjustment of the pension provisions must obviously be made to take into account that the Director is only expected to serve a particular term, rather than being appointed until retirement. Further, in certain cases, different pension arrangements might be preferable from the point of the view of the Director. For example, a Director might have been working within the public service, and so might prefer to remain under the *Public Service Superannuation Act*. Since our purpose is to provide favourable pension benefits to the Director, we suggest that the Director should be able to opt for a plan different from what we have proposed.

premature removal of a Director would make the Director virtually unaccountable. This would violate our principle that those exercising power must do so within defined limits.

Consequently, we recommend that the Director should be removable; however, we do not favour allowing removal simply by the Governor in Council acting on its own. Instead, we propose that the Director be removable by a vote of the House of Commons, on the motion of the Attorney General. Requiring that the motion be made by the Attorney General means that the Director is not directly, personally, accountable to Parliament. Rather, the Director is accountable to the Attorney General. However, requiring a vote of the House for removal of the Director enhances the accountability of the government in making such a decision. Although realistically the government, with its majority in the House, will be able to have the motion passed, nonetheless the opportunity for public scrutiny and parliamentary debate on the issue will act to make the government more accountable for the decision.

In addition, we propose that the Director only be removable on certain specified grounds, and only after a hearing before a parliamentary committee, most appropriately the House of Commons Standing Committee on Justice and the Solicitor General.²²⁹ We propose misbehaviour, physical or mental incapacity, incompetence, conflict of interest, and refusal to follow formal written directives of the Attorney General as grounds for removal. These grounds are largely adopted from those in the Commonwealth of Australia, though in our scheme, removal would not necessarily follow from any of them; in each case, it would only be a possibility.

We propose that the Attorney General should have the ability to give instructions to the Director, in the form of both general guidelines, and directives relating to particular cases. We will recommend in this paper, for example, that general guidelines should be established and published concerning the factors to consider in determining whether to recommend initiating charges, or when to permanently discontinue a prosecution. Further, we have recommended that the Attorney General should have the power to permanently discontinue any prosecution, and so could instruct the Director to do so. However, any such instructions must be in writing, and must be both published in the *Gazette*, and presented to the House of Commons.²³⁰

229. Removal of a Director will therefore be similar to the present Canadian provisions for removal of a judge. The Governor in Council can remove a judge based on a report of the Canadian Judicial Council. Having done so, the Governor in Council must then report the action to Parliament within 15 days, though no vote of the House is required: *Judges Act*, R.S.C. 1985, c. J-1, ss. 63-68.

230. The Commission has noted in *Criminal Procedure: Control of the Process*, *supra*, note 111, at 51-52 that prosecutorial guidelines would be of interest to the public, as well as serving to make the Attorney General accountable for the administration of Criminal law. The Commission also proposed a tentative list of matters where the structuring of Crown discretion would be appropriate, including a policy concerning successive or multiple prosecutions, wording of charges, and withdrawal of charges. In *Control of the Process*, we proposed that this structuring should be done by statutory rules. We now feel, however, that guidelines issued by the Attorney General or the Director will be more appropriate.

The Attorney General's ability to exercise this form of control will make the Director accountable to the Attorney General. In addition, it will make the Attorney General accountable to the House, either for directives given, or the failure to give directives when they would have been appropriate.²³¹ Further, the obligation to publish and present to the House both directives and guidelines will guarantee that involvement by the Attorney General in individual prosecutions will come to public attention. This will provide a measure of accountability concerning whether partisan political considerations have motivated the involvement.

Although we feel that accountability by the Attorney General justifies making public any directives given in particular cases, we recognize that in some circumstances, the nature of the case may be such that it would be unwise or counter-productive for those directives to be made public immediately. In matters concerning national security, for example, or in cases where investigations are still continuing without the knowledge of a potential accused, it could be contrary to the interests of justice for any directives given to be made public immediately. Therefore we have allowed for a power on the part of the Attorney General to postpone making the directives public, where this is necessary in the interests of justice.

It is also appropriate for the Director to be able to give specific directives to individual Crown prosecutors. It is not anticipated that the Director would, or indeed could, exercise control over the day-to-day decision-making involved in the prosecution service. At the same time, if the Attorney General is to be able to exercise this type of control when deemed appropriate, then the Director needs the ability to become involved in individual cases.

In addition, it will be appropriate for the Director to have the same ability as the Attorney General to issue guidelines concerning various topics.

One difference exists with regard to the publication requirements imposed on the Director and the Attorney General: specific directives of the Director need not be published. We recommend this because, although the Director will not normally be closely involved in individual prosecutions, nonetheless such involvement is possible and not undesirable. We therefore do not require that all specific directives from the Director be in writing and published. Any directives which are passed on by the Director from the Attorney General, of course, will be published due to the requirements imposed on the Attorney General.

We also feel that the Director should have any extraordinary powers possessed by the Attorney General that are directly related to the prosecution of offences, including those powers designated as available only to the Attorney General personally. Under our proposals, the powers of the Attorney General will include, for example, the ability to require a trial by jury, to select the forum of trial, to discontinue proceedings and, within some limits, to prefer charges. In addition, although we recommend a change in this regard,²³² at present the Attorney General's consent is required prior to a prosecution for some charges. All of

231. It must be acknowledged, however, that this proposal does nothing with regard to the *ex post facto* nature of the accountability.

232. See "Consent to Prosecutions" below at 67.

Royal Commission on the Donald Marshall, Jr., Prosecution

Volume I: Findings and Recommendations

Chief Justice T. Alexander Hickman
Chairman

Associate Chief Justice Lawrence A. Poitras
Commissioner

The Honourable Mr. Gregory T. Evans. Q.C.
Commissioner

December, 1989

Simply stating the powers of the Attorney General, of course, does not make clear the principles that should govern the proper exercise of those extraordinary powers. Neither does such a statement delineate the appropriate relationship between the Attorney General and other members of Cabinet when it comes to exercising that prosecutorial discretion.

In fact, the important and special constitutional characteristics of this unique office are not widely understood, even among those who occupy it from time to time.

This unique office stands astride the intersecting spheres of government and parliament, the courts and the executive, the independent bar and the public prosecutors, the state and the citizenry at large.

2.5.7 Governing principles - independence, accountability and control

The office of Attorney General functions within the context of two key constitutional principles - parliamentary supremacy and the rule of law. The rule of law includes - and requires - equality before the law. As the then federal Minister of Justice, Ron Basford, explained in the House of Commons in 1978:

...the second principle is that every citizen is subject to the law. One of the pillars of our system of government, dating back three centuries, is that neither the King nor any other person, be he a member of this House, a member of the government, a member of

the press, or someone possessed of title or position, is above the law. The law should apply to all, equally. He who breaks it must bear the consequences.

Roy McMurtry, then Attorney General of Ontario, expressed a similar view in the legislature of Ontario. He said authorities:

Legislature of Ontario Debates. 2nd session, 31st
Parliament, No. 3, pp. 50-2

... must be scrupulous to treat all members of the community equally without any regard to their position. ...the holders of public offices will receive the same treatment under the law as the ordinary citizen even though the consequences may be more injurious.

The principle that no person is above the law has now been entrenched in our Charter of Rights and Freedoms. As a practical matter, that means its importance has been enhanced because there can now be judicial scrutiny of this exercise of state power.

The principle of parliamentary supremacy normally includes - by convention - the notions of executive accountability to the legislature and ministerial and collective cabinet responsibility.

But the Attorney General is more than just a minister of the government. The Attorney General occupies a special position in relation to both the cabinet and the legislature.

As the chief law enforcement officer, the Attorney General bears a ministerial responsibility for decisions made by his Department and is accountable to the legislature. (While the Attorney General's ultimate accountability for the exercise of broad discretionary powers has traditionally been to the legislature rather than to the courts, the advent of the Charter of Rights and Freedoms as well as recent court rulings - such as the one by the Supreme Court of Canada in *Operation Dismantle v. The Queen* (1985), 18 D.L.R.(4th) 481) - suggests that discretionary decisions of the Attorney General may be subject to judicial review in the future, thus introducing a new dimension to the scope of his or her accountability.)

At the same time, other members of cabinet, who usually collectively share responsibility for decisions and directions of their colleagues, do not have to take any role or responsibility in connection with decisions the Attorney General makes in exercising his or her prosecutorial discretion. In fact, it is not constitutionally proper for them to direct those decisions. As law officer of the Crown, the Attorney General must exercise his or her prosecutorial function as an independent officer, independent of pressure from his or her cabinet colleagues. The prosecutorial decision is that of the Attorney General. The result is that the Attorney General occupies a position of independence unique among cabinet ministers.

The classic statement of principle illuminating the unique position of the Attorney General when deciding whether to prosecute in a particular case was made by Sir Hartley Shawcross, then British Attorney General, in the House of Commons in 1951, when he stated as follows:

...There is only one consideration which is altogether excluded, and that is the repercussion of a given decision upon my personal or my party's or the government's political fortune; that is a consideration which never enters into account.... I think the true doctrine is that it is the duty of an Attorney General, in deciding whether or not to authorize the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other consideration affecting public policy. In order so to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the government and indeed, as Lord Simon once said, he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations which might affect his own decision, and does not consist, and must not consist, in telling him what that decision ought to be. The responsibility for the eventual decision rests with the Attorney General, and he is not to be put, and is not put, under pressure by his colleagues in the matter. Nor, of course, can the Attorney General shift his responsibility for making the decision on to the shoulders of his colleagues. If political considerations which in the broad sense that I have indicated affect government in the abstract arise it is the Attorney General, applying his judicial mind, who has to be the sole judge of those considerations.

Over the years since then, a number of Canadian Attorneys General have made essentially the same point. In 1978, for example, Justice Minister Ron Basford defended his handling of proceedings under the *Official Secrets Act* against Tom Cossitt, a Member of Parliament, and the Toronto Sun newspaper with this argument:

I am aware that, since the enactment of the *Official Secrets Act*, this would appear to have been the first occasion in Canada where consideration has to be given to the provisions of the *Official Secrets Act* and the right of a member of the House to freely express his views in the House in the course of carrying on his parliamentary business. The first principle, in my view, is that there must be excluded any consideration based upon narrow, partisan views, or based upon the political consequences to me or to others. In arriving at a decision on such a sensitive issue as this, the Attorney General is entitled to seek information and advice from others but in no way is he directed by his colleagues in the government or by parliament itself. That is not to say that the Attorney General is not accountable to parliament for his decisions, which he obviously is... Clearly, I am entitled to seek and obtain information from others, including my colleague, the Solicitor General, and the Commissioner of the Royal Canadian Mounted Police on the security implications of recent disclosures. This I have done. In my view, the special position of the Attorney General in this regard is clearly entrenched in our parliamentary practice. Based on these authorities and on my own experience as a member of the government for ten years, which has included my three immediate predecessors, this special position has been diligently protected in theory and in practice. In arriving at these [governing principles] I have been guided by recognized authorities such as Lord Shawcross, Edwards, Erskine May and Bourinot, and more recently and very helpfully, many valuable discussions with Commonwealth Attorneys General in Winnipeg, and more particularly my personal conversations at that time with the Attorney General of England and Wales [Mr. Silkin] and the Lord Chancellor [Lord Elwyn Jones].

Similar sentiments were expressed by Basford's successor, Senator Jacques Flynn:

In dealing with a case which has been referred to him, the Attorney General is unquestionably entitled to obtain information and advice from whatever sources he sees fit, including his colleagues in Cabinet. The course of action which he adopts in particular cases must, however, in the last analysis be his decision. The Attorney General does not act on directions from his colleagues, other members of Parliament or anyone else in discharging his duties in the enforcement of the law. On the other hand

he must, of course, be prepared to answer in Parliament for what he does. These principles are well known and established not only in Canada, but in the United Kingdom and elsewhere where the system of Parliamentary democracy exists.

More recently, Ontario's Attorney General, Ian Scott, talked about this same point :

(1986-87) 29 Crim. L.Q. 187 at p. 190 and 191

...issues of whether to institute or discontinue a prosecution are not matters of government policy. The Premier and Cabinet have no power to direct whether a particular prosecution should be pursued or whether a particular appeal should be undertaken. These decisions rest solely with the Attorney General, who must be regarded for these purposes as an independent officer, exercising a function that in many ways resembles the functions of a judge.... The absolute independence of the Attorney General on questions of prosecution policy is accepted as an important constitutional principle.

In 1988, John Crosbie, a former Attorney General of Canada, responded to a question in the House of Commons on behalf of the then Attorney General this way:

H.C. Debates (Canada), Vol. 129,
pp. 18437-38, August 17, 1988

Mr. Speaker, with respect to the *Borowski* case, the Chief Law Officer of the Crown, the Attorney General of Canada, has filed, as he must do, a brief in that case setting forth a factum, setting forth the law which the law officers of the Crown feel to be pertinent to the questions in the appeal. His document is a legal submission, Mr. Speaker, not a statement of government policy. It sets forth an analysis of the current state of the law rather than being a statement of what the law might be or should be. That is the position taken by the Attorney General, who, in these matters, must operate independently of the Government. The Government cannot direct the Attorney General, nor the law officers of the Crown, as to what legal opinions they must produce.

They must give their unvarnished legal opinions, undeterred by government policy and separate altogether from any directives or directions of the Government. The Attorney General asked the court to postpone the appeal until Parliament had dealt with the matter so that the questions could be heard in a legislative context. That was his request which the court turned down. The matter is now going forward.

Although we believe there is a better understanding and acceptance of the proper principles governing the exercise of the Attorney General's prosecutorial discretion today, we have concluded that we should commend to the attention of cabinet ministers and the Attorney General (and their departmental officers) the principles set out above and the writings of such leading authorities as Professors John Edwards and Philip Stenning.

2.5.8 The role of the local Crown prosecutor

For the most part, the powers of the Attorney General are exercised by his agents, the local Crown prosecutors.

Crown prosecutors are appointed by the Attorney General and must follow his or her instructions in carrying out their duties. In any prosecution, Crown prosecutors always act as the agent of the Attorney General, making them the local embodiment of the Attorney General's discretionary prosecutorial powers.

There has been a full time prosecution service in Nova Scotia only since 1966. Its operation is based on the *Prosecuting Officers Act*,

which came into force on July 1, 1960 and has not been amended since then.

Under Sections 5 and 6 of that Act, a prosecuting or assistant prosecuting officer has "all of the powers, authorities and duties provided by the Criminal Law of Canada for prosecutors, or for prosecuting officers, or for counsel for the Attorney General." Under Section 7 of the Act, the Attorney General can appoint a special prosecuting officer "if for any reason the Attorney General considers it in the interests of the administration of justice to do so." Such an appointment may be revoked by the Attorney General at any time, or the terms of appointment varied.

Of particular significance in defining the legal relationship between the Attorney General and Crown prosecutors is Section 11(1) of the Act which provides as follows:

The Attorney General may prescribe the duties of prosecuting officers or of a prosecuting officer and may from time to time issue instructions to prosecuting officers, which instructions it shall be the duty of the prosecuting officer to observe and follow.

While the local Crown prosecutor is legally required to follow the lawful instructions of the Attorney General and is accountable for the conduct of any case, the local prosecutor has full responsibility for conduct of individual cases as a practical matter, and only in the most exceptional cases should an Attorney General or senior departmental officers become directly involved. The Attorney General, of course, remains ultimately accountable for the actions of the local prosecutors. This relationship was well described by Mr. John Clement, when in 1975, as Attorney General of Ontario, he stated that:

Philip C. Stenning,
Appearing for the Crown (1986) Page 311

The general supervisory power created in the evolution of the common law and confirmed by statute in Ontario means the local Crown Attorney must always be accountable to the Attorney General. However, it must be stressed that this accountability is part of the continuum. While a Crown Attorney is accountable to the Attorney General, in a very general sense, for his behaviour and activities in the administration of justice, the Attorney General is accountable to society specifically and answers in the Legislature for the entire process through which justice is administered in the province.

It has never been suggested, however, that the Attorney General assume responsibility for the day-to-day administration of justice. Under our system, the Attorney General is ultimately responsible to the people while local Crown Attorneys are granted a broad and generous area of unfettered discretion in criminal prosecutions. Subject only to very wide and general guidelines as to policy, the Crown Attorney is free to decide whether or not to launch a prosecution, the manner in which it will be prosecuted and how he will handle the matter at trial. In all these matters and in the general administration of justice within his jurisdiction, the Crown attorney knows that he has more than enough authority to respond adequately to the situations in which he is involved.

In addition to being accountable to the Attorney General for the performance of their duties, Crown prosecutors are accountable to the courts and the public. In that sense, the Crown prosecutor occupies what has sometimes been characterized as a quasi-judicial

office, a unique position in our Anglo-Canadian legal tradition.

In his judgment in a 1955 Supreme Court of Canada case, Mr. Justice Rand gave classic expression to this concept:

Boucher v. The Queen, [1955] S.C.R. 16 at 23

It cannot be overemphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have the duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed with legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justice of judicial proceedings.

More recently, the Ontario Court of Appeal held that:

R. v. Logiacco (1984), 11 C.C.C.(3d) 374
(Ont.C.A.) at 379

Great trust is placed in the Crown prosecutor by the courts and by the public. Heavy obligations are imposed upon him in his quasi-judicial role. To be worthy of the trust and reliance which is placed in his office, he must conduct himself with becoming dignity and fairness.

Attorneys General, and their agents, the local Crown prosecutors, clearly exercise enormous discretionary powers when carrying out their prosecutorial functions. At the same time, the positions they occupy are also obviously ones of great trust that demand standards of personal and professional integrity, competence and commitment to fundamental principles of an equally high order.

2.5.9 The decision to prosecute

We start with the fundamental proposition that "justice must not only be done, but must be seen to be done." The ultimate test of whether justice is seen to be done, of course, is how the public perceives the handling of any particular case. If there is a broadly held belief that the justice system, or one of its components, has handled a case unevenly or unfairly, that is a strong indication something is amiss. In such a situation there is truth to the notion that perception becomes reality; like a cancer, it spreads insidiously throughout the community with debilitating and corrosive effects within and without the system.

An isolated case of substantial or perceived injustice can seriously damage the public's confidence in the administration of justice. A series of such incidents can create widespread cynicism and lack of faith. The Donald Marshall, Jr. case is clearly one of substantial injustice. In the end, the injustices in the Thornhill investigation and the MacLean case had more to do with form and process than substance, but the way in which they were handled contributed greatly to a widespread public perception that there is a separate system of justice - with special treatment and special advantages - for those occupying positions of political power and influence.

The result has been, at best, public questioning of the fairness of the system and, at worst, a loss in public confidence in the integrity

of the system itself. Ultimately, the integrity of the administration of justice depends on the integrity, independence, character and professional competence of the law officers of the Crown.

John U. J. Edwards, (1969)
12 Crim. L.Q. 417 at 424

Nothing is more calculated to engender disillusionment with the criminal justice system and its constituent parts - the police, prosecutors, judges or the executive branch of government - than disclosures indicating a susceptibility to extraneous pressures. I have no doubt in my mind that the greatest safeguard against the sully of the pillars of justice is to be found in the integrity and independence of the individuals who, in their respective capacities, have to administer the several parts of the system. Without these personal qualities any structure is extremely vulnerable. The responsibility of government is to create the kind of machinery that will assist, rather than prejudice, the fulfillment of those ideals which are essential to maintaining public confidence in the criminal justice system.

While those personal qualities of independence and integrity are the foundation of the system, they must be supported by an organizational structure that provides checks and balances against potential abuse.

We have considered a number of alternative models in order to come up with a workable framework for the exercise of prosecutorial decision-making. Edwards, in his research for the Commission, described six prevalent models for such decision-making. (Volume 5, Pages 96-98) We also considered a series of alternative approaches reflected in the systems in the Republic of Ireland, Northern Ireland, Scotland and New Zealand. In addition, we looked at the American experience with an Office of Special Prosecutor or Independent Counsel, which developed in response to the Watergate affair of the early 1970s.

In considering and evaluating the appropriateness of all of these various approaches to the Canadian and Nova Scotian context, we have been guided by several principles. The first is that any model must ensure the maximum degree of independence from improper extraneous influences in the conduct of prosecutions. A closely related principle is that parliamentary or legislative accountability for the exercise of prosecutorial decision-making in individual cases must be maintained.

The challenge has been to find the model that best reflects the right blend of independence and accountability. We believe it is essential to our system of justice that a minister of the Crown continue to be responsible to answer for the administration of justice in the legislature. Even if the Attorney General were a non-political, independent public servant, we believe it would be essential that that individual continue to be accountable to the legislature.

That is why we reject the concept of a totally independent Director of Public Prosecutions (or Attorney General), who would be accountable to no one except his or her conscience and the law. We also reject the concept of a "special prosecutor" appointed on an *ad hoc* basis because we believe a properly structured organization staffed with competent individuals should provide the necessary independence in the prosecutorial process.

In order to guarantee the maximum independence in prosecutorial decisions, we believe it is vital that the minister of the Crown responsible for the administration of justice become involved in the disposition of individual cases only in the most exceptional circumstances and that the nature and extent of any such involvement be publicly recorded.

As a matter of principle, we do not believe it is appropriate for the Attorney General to become involved in day-to-day decisions affecting individual cases, but we recognize there will be exceptional circumstances in cases that raise public interest issues with significant implications for the public at large. We believe such considerations, which are admittedly political in the broad sense of the word, are legitimate factors to be weighed in the exercise of prosecutorial discretion. The important point, however, is that these must be made public.

As a result of all of those considerations, we are recommending creation of the office of an independent Director of Public Prosecutions in Nova Scotia. We believe that the creation of such an office, similar to the one adopted in the Commonwealth of Australia, will go a long way to restoring the public's belief that their criminal justice system is being administered properly and with fairness to all.

Recommendation 35

We recommend that:

(a) there be created by statute the office of Director of Public Prosecutions, and that the holder of this office:

(i) be a member of the bar of Nova Scotia (or equivalent) for a minimum of ten years;

(ii) be appointed by the Governor in Council after consultation with the officers of the Nova Scotia Barristers Society and with the two Chief Justices of the Superior Courts in Nova Scotia, for a term of ten years, with eligibility for re-appointment;

(iii) be removable for cause by the Governor in Council only after a resolution from the provincial legislature approving such action;

(iv) be paid and given employment benefits not less than those of a judge of the County Court of Nova Scotia, and have the status of a departmental "deputy head";

(b) the duties and responsibilities of the Director of Public Prosecutions include:

(i) the exercise of all of the functions of the Attorney General as agent and deputy of the Attorney General in relation to the administration of criminal justice in the province, subject to paragraph (c) below; and in particular;

(ii) regular consultation with the Attorney General concerning all aspects of public prosecution and the administration of the prosecution service;

(iii) the direction of the prosecution service of the province,

-
- including supervision of those functions presently exercised by the Director (Prosecutions) and the Director (Criminal);*
- (iv) the presentation of an annual report to the Attorney General on the conduct of public prosecutions in the province, which shall describe, among other matters, any personal interventions by the Attorney General pursuant to paragraph (c)(i);*
- (c) the Attorney General continue to exercise the duties and responsibilities traditionally accorded to that office in relation to the administration of criminal justice, subject only to the limitations which follow:*
- (i) where he or she deems it necessary, the Attorney General may intervene in a prosecution contrary to the advice of the Director of Public Prosecutions but only through the use of written instructions which shall be published within 30 days of their issuance in the Royal Gazette, or following expiry of the appeal period, whichever is later;*
- (ii) the Attorney General shall, after consultation with the Director of Public Prosecutions, issue guidelines for the exercise of prosecutorial discretion which shall be tabled in the provincial legislature as soon as is practicable after their issuance; and*
- (iii) the Attorney General shall table in the provincial legislature as soon as is practicable the annual report received from the Director of Public Prosecutions pursuant to paragraph (b)(iv).*
-

In the summer of 1989 the Nova Scotia Government advertised for a position entitled "Director of Public Prosecutions". This position was described as being one of independence with security of tenure. The position is however, non-statutory, and accordingly, as an Order in Council appointee, the DPP's authority will inevitably be subject to the views of Cabinet. In Recommendation 35 we have recommended that the office of DPP be statutory. We have made this recommendation because we believe that public confidence in the administration of justice in Nova Scotia is lacking, and that there is a perception of political interference. A DPP who is not protected by statute is not a satisfactory solution to this lack of confidence.

2.5.10 The police

From our review of the Marshall, Thornhill and MacLean matters, it is clear the police do not consistently exercise their independent right to commence an investigation and lay a charge. If the criminal justice system is to function fairly, the police must carry out their responsibilities without being influenced by extraneous considerations.

Inherent in the principle of police independence is the right of the police to determine whether to commence an investigation. While the responsible ministry can set general policies with respect to all policing matters, including investigations, no police force should consider that it requires authorization from the Crown before commencing an investigation.

We recognize that cooperative and effective consultation between the police and the Crown is also essential to the proper administration of justice. But under our system, the policing function - that of investigation and law enforcement - is distinct from the prosecuting function. We believe the maintenance of a distinct line between these two functions is essential to the proper administration of justice.

Recommendation 36

We recommend that the following policy statement be included in the Crown Prosecutors' Manual:

- (a) in the investigation of offences prior to the laying of charges, it is understood that the police officers are to carry out their duties in accordance with the law and general standards, practices and policies established by the Solicitor General, but in consultation with the appropriate Crown prosecutor where necessary; and*
 - (b) after the laying of charges, police shall carry out any investigations in accordance with the instructions of the Attorney General or appropriate prosecutor with a view to preparation of the case for presentation in court.*
-

We believe that the right of the police to lay a charge ensures protection of the common law position of police independence and acts as an essential check on the power of the Crown. As one Nova Scotia Crown prosecutor put it in our survey:

Provides a check on power of Crown; if Crown could order that a charge not be laid, there is no accountability and the whole procedure would be secret; if police lay charge - Crown must determine its future in open court (i.e. withdrawal, stay, charge, proceed).

There are cogent arguments for the Crown to screen potential police charges, including the suggestion that the police too often overcharge, or charge inappropriately or inadequately with the result that it creates inefficiencies in the system and extreme prejudice to the accused.

Balance must be maintained between the right of the police to lay a charge and the right of any citizen not to be charged without a thorough investigation and due consideration. While our system clings to the presumption of innocence, it is an inescapable fact that charging an individual results in damage to that individual and his or her reputation or career that is all but irreparable.

We do not wish to interfere with the right of the police to lay a charge, but when competent Crown law officers give advice in good faith, we believe that advice should be rejected only after careful consideration. If there is a disagreement, it should be first discussed between the police force and the Department of Attorney General at correspondingly higher levels. If a disagreement still exists after pursuing such discussions to the highest level on each side, the police should then, if they still feel it is warranted, lay the charge. The police department should have a clear written policy setting out the steps to be taken in the event of a disagreement between the police and Crown respecting the laying of a charge.

There should be increased and more effective consultation between the police and the Crown in preparing charges in order to eliminate problems of overcharging or poorly drawn charges. At the same time, there should also be a system of post-charge screening to facilitate the elimination of unnecessary charges prior to arraignment and the termination of prosecutions that ought not to go forward.

This issue was carefully considered by the 1981 Philips Royal Commission on Criminal Procedure in the United Kingdom. We agree with the following philosophy and underlying principles:

Report of the Royal Commission on Criminal Procedure (1981), Pages 146-149

We want to secure that after a clearly defined point during the preparation of a case for trial and during its presentation at trial someone with legal qualifications makes the variety of decisions necessary to ensure that only properly selected, prepared and presented cases come before the court for disposal; and to do that without diminishing the quality of police investigation and preliminary case preparation and without increasing delays.

In order best to attain this we would leave with the police complete responsibility for investigating offences and for making the initial decision whether to bring the matter before a court (that is, under present procedures, whether to charge or to apply to the court for issue of a summons or warrant of arrest), or to take no proceedings. It also includes the decision whether to caution as an alternative to prosecution which in our view should continue to be the responsibility of the police.... Once that initial decision has been taken the case is within the jurisdiction of the court. This seems to us to be the clearest point which for the purpose of legislation, can be used to mark the division in responsibilities of the police and the prosecutor. After that point the case should become the responsibility of the latter...; he may then on the information before him decide to proceed as charged, or to modify or withdraw the charges. In practice there is, of course, a variety of decisions taken as a case is being prepared for trial and is being tried. Those decisions will be for the prosecutor; and it is in that sense that he will have responsibility for the conduct of the case once the initial decision to proceed has been taken.

...The police will retain unimpaired their law enforcement role and the primary responsibility for bringing detected offenders before the courts. Because of this the police will have to develop their cases as well as they can..., and where they have any doubt or need guidance on points of law or evidence will consult the local prosecutor before they initiate proceedings, ...Thus the police will be required to sustain their standards of training and performance in all aspects of their investigative work, including case preparation. The prosecutor will have an independent role in the later stages of the process and an enhanced status because of that. His experience of the courts' view of cases that are improperly brought in terms of the public interest will enable him to act as an additional filter on proceeding with such cases and his role and status in the system will add weight to his advice to the police on these types of case before the initial decision to proceed is taken. The system is, therefore, one which depends upon cooperation, with checks and balances operating within a framework in which all are seeking the same objectives.

...Drawing the line at the point of charge both recognizes the need for the police to continue to have discretion over the initiation of proceedings as an essential element to their law enforcement role and has the merit of being clear cut. We do not imagine that it will eliminate all disputes since whenever issues are delicately balanced one must expect debate and possible disagreement. But we expect there to be consultation, as there is now. The police and the prosecutor will be aware of the other's interests and responsibilities. As we have observed earlier the roles are interdependent. They must inevitably work in partnership.

In Nova Scotia, there clearly has been confusion over the question of the police's unfettered right to lay charges. In the Thornhill investigation, for example, Deputy Attorney General Gordon Coles strongly believed that he, acting for the Attorney General, had the right to instruct the RCMP not to lay charges. Although the RCMP did not accept the validity of this position, they did acquiesce in the face of the Attorney General's wishes.

We believe the most appropriate way to handle such situations is reflected in the way the Morgentaler matter in *Campbell v. Attorney General of Ontario* was dealt with by Ontario Attorney General Ian Scott. After the charges were laid, Scott stayed proceedings in open court and publicly stated the reasons for his decision.

Campbell v. Attorney General of Ontario (1987),
31 C.C.C.(3d) 289 (Ont. H.C.) at 292

Constitutional authority in this country, and the United Kingdom, makes it plain that the decision to investigate alleged offences and to lay charges is the constitutional responsibility of the police. The Crown Law Office must determine how and when to proceed with charges once they are laid. In 1925 Sir John Simon made it plain that there was no obligation to prosecute merely because there is what the lawyers call 'a case'.

The discretion of the Attorney General to proceed with a charge in any given time, now or later, is a quasi-judicial one in which the effect of the prosecution upon the administration of law and of government in the abstract must be considered.

In this case, the police advised the Attorney General that they intended to lay charges. The Attorney General acknowledged their right to do so, but advised that he would enter a stay once charges were laid. He did not attempt to interfere with, or direct, the police in this case. We agree with Scott that the proper resolution of this difference of opinion was through an open and public process in which each authority exercised its proper constitutional responsibilities.

Recommendation 37

We recommend that:

- (a) *police officers be informed in general instructions from the Solicitor General that they have the ultimate right and duty to determine the form and content of charges to be laid in any particular case according to their best judgment, subject to the Crown's right to withdraw or stay the charges after they have been laid;*
- (b) *within each police force there be a clear written policy on resolving disagreements between police and Crown over the laying*

of charges, and that such policy provides that no charge shall be laid contrary to the advice of the Crown unless and until discussions have been held between the highest levels of police and Crown;

(c) within each police force and within the Department of Attorney General there be a clear written directive requiring absolute confidentiality and secrecy of the identity of persons being investigated other than on a need to know basis within the police force and the Department;

(d) prosecutors be informed in general instructions from the Attorney General that police officers have the right and the duty to determine the form and content of charges to be laid in any particular case, subject to the Crown's right to withdraw or stay the charges after they have been laid;

(e) police officers and Crown prosecutors be informed by their respective departmental superiors that police are encouraged to consult with the appropriate prosecutor concerning the drafting of informations, where such consultation might be thought useful; and

(f) the Attorney General institute a system of post-charge screening in appropriate locations in the province (initially as a pilot project) to ensure that no charges which are not strictly necessary in accordance with the evidence and the public interest shall go forward.

2.5.11 Termination of prosecution - public interest factors

The Crown bears the final burden of deciding whether a prosecution will actually take place. Although the police usually only lay a charge after a proper investigation and after the Crown, at least in complex cases, agrees there is sufficient evidence to sustain a conviction, the Crown remains the guardian of the public interest - occasionally it may be decided that the public interest requires that an otherwise well-founded prosecution should not proceed.

In the words of Lord Shawcross:

Draft English Criteria for Prosecution,
cited in Volume 6, Page 50

It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution. Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should... prosecute 'wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest'. That is still the dominant consideration.

While decisions to discontinue a prosecution in the "public interest" must be made on a case-by-case basis, there should be clear direction on what types of considerations are properly in the public interest. At present, there is no such direction in Nova Scotia. In exploring this subject in his research, Professor Archibald found that:

...responses to the Crown Survey give great cause for concern. They indicate on the part of many prosecutors a basic lack of understanding of what has traditionally been conceived of as an important aspect of the exercise of prosecutorial discretion. This may be attributable to an inadequate grounding in criminal law theory during their basic legal training. However, it is clear that the Department of the Attorney General is not correcting this misconception over public interest factors in the prosecution of offences. The Blue Binders of 'Advice to Prosecuting Officers' do not address these issues and the apprehensiveness of the Director (Prosecutions) on the issue would not lead one to conclude that matters are being clarified regularly in other ways... To prevent injustices and the costs of needless prosecutions, a public interest policy ought to be developed. Such policies have been developed in England, Australia and the United States, and provide a rational basis for identifying the public interest factors which should lead a prosecutor not to prosecute even where the evidence would allow it.

During the public hearings, we were told of a shoplifting case that occurred in Sydney. The police laid charges but, prior to trial, a friend of the accused contacted Deputy Attorney General Coles about the case. Without first contacting the local Crown prosecutor or reviewing the file, he instructed the local prosecutor to withdraw the charge. The prosecutor complied, stating in open court that he had been instructed to withdraw the charge.

Coles testified that he issued his instruction because of the health and age of the accused, and the fact that the accused was no longer a resident of the area. Whatever the legitimacy of the actual decision itself, the direct intervention by the Deputy Attorney General, following a phone call from a friend of the accused, is a blatant misuse of authority. To issue instructions to withdraw a charge without consulting the responsible prosecutor and without reviewing the facts of the case can only be described as a highly improper exercise of prosecutorial discretion. Such improper and unprincipled interference can only lend credence to a public perception that justice varies according to who you know.

Recommendation 38

We recommend that:

- (a) the Attorney General promulgate a clearly stated policy concerning the public interest factors which should, and should not, be considered in deciding whether to undertake or stop a prosecution even in the face of evidence which could sustain a conviction;*
- (b) the factors which might arise for consideration in determining whether the public interest requires a prosecution, include:*
 - (i) the triviality of the alleged offence or that it is of a "technical" nature only;*
 - (ii) the age, physical health, mental health or special infirmity of an alleged offender or witness;*
 - (iii) the staleness of the alleged offence;*
 - (iv) the degree of culpability of the alleged offender (particularly in relation to other alleged parties to the offence);*
 - (v) the likely effect of a prosecution on public order and*

-
- morale;*
- (vi) the obsolescence or obscurity of the law;*
- (vii) whether the prosecution would be perceived as counter-productive (such as by making a "martyr" of an alleged offender or by providing publicity to an alleged hate propagandist);*
- (viii) the availability or efficacy of any alternatives to prosecution in the light of the purposes of the criminal sanction;*
- (ix) the prevalence of the alleged offence and any related need for deterrence;*
- (x) whether the consequences of any resulting conviction would be unduly harsh or oppressive;*
- (xi) any entitlement of the State or other person to compensation, reparation or forfeiture if prosecution action is successful;*
- (xii) the attitude of the victim of the alleged offence to a prosecution;*
- (xiii) the likely length and expense of a trial;*
- (xiv) whether the alleged offender is willing to cooperate in the investigation or prosecution of others, or the extent to which he or she has already done so;*
- (xv) the likely outcome in the event of a finding of guilt, having regard to the sentencing options available to the court;*
- (xvi) the necessity for the maintenance of public confidence in legislatures, courts and the administration of justice;*
- (c) the factors which are to be excluded from consideration in determining whether the public interest requires a prosecution, include:*
- (i) the alleged offender's race, religion, sex, national origin, political associations, or beliefs;*
- (ii) the prosecutor's personal feelings concerning the victim or the alleged offender;*
- (iii) any partisan political advantage or disadvantage which might flow from the decision to undertake or stop a prosecution; or*
- (iv) the possible effect on the personal or professional circumstances of those responsible for the prosecution decision;*
- (d) where the prosecutor decides not to undertake or to stop a prosecution by reason of a public interest factor such as those mentioned in (b), a notation of this decision be placed in the file relating to the case in question;*
- (e) the Solicitor General bring the foregoing public interest factors relevant to the prosecution of offences to the attention of police forces operating within the province.*
-

**Report of the Attorney General's
Advisory Committee
*on***

**Charge Screening, Disclosure,
and
Resolution Discussions**

The Honourable G. Arthur Martin, O.C., O.Ont., Q.C., LL.D.
Chair



**Advisory Committee to the Attorney General
on Screening of Criminal Charges,
Resolution Discussions and Disclosure**

The Honourable G. Arthur Martin, O.C., O. Ont., Q.C., LL.D.
Chair

Mr. B. Lee Baig, Q.C.
Committee Member

Mr. D. Fletcher Dawson
Committee Member

Mr. Joe DeFilippis
Committee Member

Chief Julian Fantino
Committee Member

Superintendent Wayne Frechette
Committee Member

Ms. Mary Hall
Committee Member

Mr. S. Casey Hill
Committee Member

Mr. Earl Levy, Q.C.
Committee Member

Inspector Rolly MacDonald
Committee Member

Ms. Katherine McLeod
Committee Member

Mr. Daniel M. Mitchell
Committee Member

Staff Sgt. Alfred W. Oakley
Committee Member

Mr. W. Brian Trafford, Q.C.
Committee Member

Ms. Beverly Ward
Committee Member

David Butt
Researcher

C. Principal Aspects of the Committee's Recommendations

1. The Role and Responsibility of Counsel and the Police

In order to command public confidence, the administration of criminal justice must operate fairly, with integrity, and with such reasonable expedition as is consistent with the other objectives of the criminal justice system. As one former Crown counsel, also an elected Bencher, said to the Committee, the object is not to put as many accused as possible in jail as quickly as possible, but to achieve justice.

An accused is entitled to his or her legal and constitutional protections as a matter of right. Among the constitutional rights of an accused is the right to be presumed innocent until proven guilty beyond a reasonable doubt in a fair and public hearing before an independent and impartial tribunal. These rights may of course be waived, for example, by a plea of guilty, subject, of course, to the Court's overriding duty to preserve the integrity

of its process. In many cases, it is to the advantage of an accused who is guilty to plead guilty at the earliest reasonable opportunity.

Fairness requires the Crown prosecutor to disclose to the accused the case he or she must meet, and to disclose to the accused any evidence in the Crown's possession or under the Crown's control that is favourable to the accused. The requirement of fairness does not, however, preclude due regard being paid to matters such as the privacy of innocent people, or the protection of the safety of witnesses.

The police, Crown counsel, and defence counsel are integral parts of the criminal justice system, even though they perform different functions. In discharging their respective functions, it is the duty of each to act responsibly and with integrity. Responsibility and integrity are fundamental to the discharge of the duties of the police, Crown counsel, and defence counsel alike, and any failure in this respect undermines public confidence in the administration of criminal justice.

The need for all participants in the early stages of the criminal justice process to act with uncompromising integrity cannot be overstated. Integrity on the part of all is a crucial assumption that underlies virtually all of the Committee's recommendations and discussions. Integrity is, of course, the highest professional duty of counsel, as an officer of the Court.²¹ Likewise, it is the essence of a police officer's oath of office.²² As one member of the Court of Appeal observed to the Committee, without integrity, no system of justice, no matter how ingeniously designed and lavishly funded, can function. This is particularly true of the early stages of the criminal justice process.

²¹ The Law Society of Upper Canada, *Rules of Professional Conduct*, Rule 1, Integrity.

²² O. Reg 144/91 under s. 45 of the *Police Services Act*, R.S.O. 1990, c. P.15; Ontario Gazette, Vol. 124-16, pp. 1467-68, 20 April, 1991.

The Supreme Court of Canada, in *R. v. Swain* (1991), 5 C.R. (4th) 253 at 281, has recently reaffirmed the long-settled notion that our system of criminal justice is essentially adversarial. Accordingly, criminal proceedings continue to be in large measure driven by the actions of counsel on behalf of either the Crown or defence, which contrasts with inquisitorial systems of justice where the Court may in large measure direct the inquiry into alleged criminal wrongdoing. The many necessary steps that precede the trial of a criminal action are in an adversarial context undertaken by counsel, without supervision. It is Crown counsel, in consultation with the police and victims and, perhaps, defence counsel, who decide what charges are to be taken to court. It is Crown counsel, again, perhaps, in consultation with the police, who make initial decisions about disclosure. It is Crown and defence counsel who decide, subject to rulings on admissibility, what evidence will be presented for consideration by the Court. And it is Crown and defence counsel, after consultations or instructions, who conduct in their entirety the resolution discussions that spell the outcome of such a vast proportion of the charges coming before the courts.

All of these decisions precede a trial in open court, and therefore, for the most part, precede formal judicial supervision. However, all of these decisions have potential to gravely affect the liberty and well-being of the accused, and, in some instances, the victim or other witnesses. Charging decisions determine whether an accused must face the anxiety, expense, and perhaps embarrassment of a criminal trial. When the evidence is strong, charging decisions may in large measure determine whether there will be a conviction. Charging decisions may affect an accused's liberty for years, including both pre- and post-trial liberty.²³ On the other hand, charging decisions that are not appropriately sensitive to the devastation suffered by the victim may engender considerable trauma and disillusionment on the part of the victim with the administration of criminal justice, and may open the justice system to criticism from the public at large. Sexual assault, for example, has been said to be a much under-reported crime, due in part to a perceived failure by the

²³ J. Vorenburg, "Decent Restraint of Prosecutorial Discretion" (1981), 94 *Harv. L. Rev.* 1521 at 1525-1526.

justice system to respond to the plight of the victim.²⁴ (The current growth in frequency of sexual assault prosecutions is, however, evidence that the situation is changing.) Disclosure decisions, made by the Crown and investigative agencies, are no less important. We need look no further than the factual findings of the recent Royal Commission on the Donald Marshall, Jr., Prosecution for telling examples of non-disclosure, both before and after conviction, that would have meant, in the opinion of the Royal Commissioners, a not guilty verdict at trial or re-trial,²⁵ instead of years of incarceration for a murder that Mr. Marshall did not commit. On the other hand, the very lives of confidential informants are greatly at risk in some undercover investigations if disclosure is not handled with sensitivity and careful timing. In other words, disclosure decisions can be literally a matter of life or death for confidential informants. Third, plea resolution decisions obviously have significant and potentially long-lasting consequences for accused persons, given the difficulty of setting aside a plea entered into with the advice of counsel,²⁶ and given the law that joint submissions as to sentence, although not decisive, are entitled to great weight.²⁷

Much has been said and written about the judge as decision maker in the criminal trial, and the highest standard of integrity expected of him or her in discharging such an important responsibility. It is easy to see from the foregoing, however, that while the judge is, of course, the ultimate decision maker in the criminal trial process, the decisions of counsel are also very likely to affect greatly the liberty of the accused and the well-being of victims or witnesses. Furthermore, counsel are called upon to make these important

²⁴ Canada, *Report of the Canadian Federal-Provincial Task Force on Justice for Victims of Crime*, Minister of Supply and Services, 1983, at p. 16; P. Marshall, "Sexual Assault, the Charter and Sentencing Reform" (1988), 63 C.R. (3d) 216 at 217.

²⁵ *Royal Commission on the Donald Marshall, Jr., Prosecution* (the *Marshall Commission*), Vol. 1, Factual Findings, pp. 71-72, 79-83.

²⁶ *Brosseau v. The Queen*, [1969] 3 C.C.C. 129 at 138-139 (S.C.C.); *Adgey v. The Queen* (1973), 13 C.C.C. (2d) 177 at 188-189 (S.C.C.); *R. v. R.T.* (1992), 10 O.R. (3d) 514 (Ont. C.A.).

²⁷ *R. v. Rubenstein* (1987), 41 C.C.C. (3d) 91 at 94 (Ont. C.A.).

decisions frequently in the course of any one criminal case. And, unlike the trial judge's decisions, counsel's decisions about charging, disclosure, or resolution of the case are rarely made in open court with reasons transcribed as part of a public record, and are rarely subject to direct appellate review. It follows, then, that since the need for integrity flows from the way in which decisions are made, and from their importance, the standard of integrity expected of counsel conducting a criminal case is very high indeed, and must remain so.

Integrity is not the cornerstone of the administration of adversarial justice simply because of the importance of the decisions to be made by counsel and the Court. Integrity is likewise fundamentally important because of the complement it fosters, namely, reliability. No decision taken in the context of an adversarial criminal proceeding is without consequences for other participants in the process. For example, charging decisions by the prosecution affect plea positions taken by the accused, disclosure decisions affect the preparation of the defence, and resolution decisions affect the necessity for attendance at trial of witnesses and investigating officers. Because parties who stand in adversarial relationships to each other will be greatly affected by each other's decisions in discharging their own duties, there is an inherent necessity that those decisions be reliable. Simply put, if Crown counsel, defence counsel, and police officers cannot rely upon each other with respect to the information they convey to each other about the case at hand, none of these three parties can properly do his or her own job, and the administration of justice as we presently understand it becomes unworkable.

The Committee, therefore, emphasizes at the outset that the principal theme animating its discussions and recommendations that follow is the requirement of integrity, which includes reliability, on the part of all professional participants in the administration of criminal justice.

counsel must never knowingly adduce evidence which he or she knows is fabricated; he or she must not mislead the Court.

Crown counsel's traditional responsibilities, often stated through the years, are two-pronged. The Royal Commissioners inquiring into the prosecution of Donald Marshall, Jr., stated them in this way:

The Crown prosecutor occupies a dual role, being obligated on the one hand to prosecute vigorously those accused of crime, and on the other hand to ensure that the power of the State is used only in pursuit of impartial justice.³⁰

The dual nature of Crown counsel's traditional responsibilities has given rise to some expressions of concern that its two facets are at times inherently contradictory. For example, one writer has commented that Crown counsel are "in the unenviable position of serving several masters at the same time."³¹ This has led some to call for a reconsideration of the role of Crown counsel.³² The Committee acknowledges these concerns. Reconciliation by Crown counsel of his or her function as an advocate and an impartial

³⁰ The *Marshall Commission*, Vol. 1, at p. 241. The leading statement of this principle is no doubt that of Rand J. in *Boucher v. The Queen* (1954), 110 C.C.C. 263 at 270 (S.C.C.). See also *R. v. Savion and Mizrahi* (1980), 52 C.C.C. (2d) 276 at 289 (Ont. C.A.) per Zuber J.A. for the Court:

By reason of the nature of our adversary system of trial, a Crown prosecutor is an advocate; he is entitled to discharge his duties with industry, skill and vigour. Indeed the public is entitled to expect excellence in a Crown prosecutor just as an accused person expects excellence in his counsel. But a Crown prosecutor is more than an advocate, he is a public officer engaged in the administration of justice

³¹ A.W. MacKay, "The Influence of the Prosecutor: Plea Bargaining, Stays of Proceedings, Controlling the Process" in S. Oxner (ed.), *Criminal Justice* (1982), p. 69 at 76. See also A. Maloney, Q.C., "The Supreme Court and the Role of Crown Counsel" (1980), 1 *Sup. Ct. L.R.* 472; W.C. Gurlie, "The Role of the Prosecutor: Fair Minister of Justice with Firm Convictions" (1982-83), 12 *Man. L.J.* 31; and J.A. Sutherland, "The Role of Crown Counsel: Advocate or Minister of Justice?" (1990), unpublished LL.M. Thesis, University of Toronto.

³² Sutherland, *supra*, at pp. 247-248; S.Z. Fisher, "In Search of the Virtuous Prosecutor: A Conceptual Framework" (1988), 15 *Am. J. Crim. Law* 197; B.L. Gershman, "Why Prosecutors Misbehave" (1986), 22 *Crim. L. Bull.* 131; R.N. Jonakait, "The Ethical Prosecutor's Misconduct" (1987), 23 *Crim. L. Bull.* 550.

minister of justice may frequently be difficult. But this has not led the Committee to conclude that it is necessary to rethink the dual nature of the role of Crown counsel.

It cannot be forgotten that Crown counsel is only one of the participants in an adversarial system of justice. Crown counsel performs his or her duties in the context of a system that ascribes fundamentally important, and counterbalancing, responsibilities to defence counsel, and to the judge. It is the interaction of these three parties in the criminal process, and not the action of Crown counsel alone, that ensures just outcomes to criminal proceedings.³³ Further, the dual role of Crown counsel as advocate and minister of justice is too important to the administration of justice in an adversarial system, and too deeply embedded in our legal traditions, to be lightly cast aside. As stated above, little is more important to the preservation of organized society than the active denunciation of criminal wrongdoing. In an adversarial context, this important objective must be achieved in large part by an effective advocate for the prosecution. On the other hand, prosecutors acting on behalf of the state in an adversarial criminal proceeding wield such significant power, much of it not subject to judicial control in advance, that the importance of prosecutors acting as "ministers of justice" cannot be overstated.

It is commonplace that those charged with decision-making in the conduct of human affairs will be faced with difficult choices. Given the importance of the decision-making role they occupy, Crown counsel cannot expect that their duties would be any different in this respect. Accordingly, the difficult decisions that Crown counsel's dual role as both advocate and minister of justice casts upon them are not going to be eradicated by reformulating the role; it is expecting too much of the mere statement of one's duties that such a statement should be capable of answering every conceivable problem that could arise. Difficult and close decisions will continue to present themselves on any view of Crown counsel's proper role, which, of course, only serves to highlight the great need for Crown counsel to possess in abundance the irreducible virtue of sound judgment. In this regard, it is the Committee's

³³ B.A. Green, "The Ethical Prosecutor and the Adversary System" (1988), 24 *Crim. L. Bull.* 126.

opinion that Crown counsel faced with difficult decisions should not hesitate to consult with more senior Crown counsel.

It is, therefore, the Committee's view that Crown counsel's dual role as both advocate and minister of justice, fulfilled with the utmost integrity and sound judgment, is, like the complementary roles of defence counsel and the judge, essential to the administration of justice in Ontario. In keeping with such a view, it cannot be overemphasized that the effectiveness and worth of the Committee's recommendations depend greatly on the assumption that, like defence counsel, Crown counsel will adhere diligently to this conception of their responsibilities.

Crown and defence counsel, of course, owe unquestionable allegiances to the community (as both advocate and minister of justice), and the client, respectively. However, it cannot be forgotten that both Crown and defence counsel are also officers of the Court. Lord Reid captured this aspect of counsel's responsibility in the same breath that he stated counsel's primary duty to the client, as quoted above. After making the point that counsel must fearlessly pursue every issue that will help the case, His Lordship continued:

But, as an officer of the court concerned with the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests.³⁴

Counsel's responsibility as officers of the Court makes them more than simply representatives of a particular interest or set of interests. They are not merely agents. They are independent professionals, and key participants in a system of administering justice. Consequently, counsel's efforts as advocates are necessarily constrained by the system within which they function, and to which they owe allegiance. They must advocate on behalf of the

³⁴ *Rondel v. Worsley*, *supra*, at 227-228. See also G.A. Martin, "The Role and Responsibility of the Defence Advocate" (1969-70), 12 *Crim. L.Q.* 376.

interests they represent, be they those of an accused person, or the community at large, in a manner that invites and enhances public respect for the justice system.³⁵

The responsibility of counsel to act in a manner consistent with the due administration of justice takes on particular importance as the criminal justice system becomes increasingly vast, complex, and potentially unwieldy. As the criminal justice system's prevailing "modes of arriving at truth" adapt to "shifting necessities,"³⁶ responsible counsel will likewise adapt, diligently and effectively furthering the interests they represent in the context of the newly evolved practices or procedures. In short, when the practice of criminal law changes for the better, so must its practitioners.

The Bar is, and in the Committee's view, of course, must remain, resolutely independent. However, it cannot be forgotten that an independent Bar is nothing more (and nothing less) than one important aspect of our system of administering justice, and that system belongs to, and is for the benefit of, the community. Therefore, given the independence of the Bar, it is solely a matter of professional responsibility that the Bar, as servants of the administration of justice and, ultimately, the community, adapt to the needs of the community as necessary.³⁷ The Committee assumes, and indeed calls upon, that sense of responsibility in many of its recommendations.

³⁵ See generally, "Problems in Ethics and Advocacy," *Law Society of Upper Canada Special Lecture Series* (1969), at p. 279.

³⁶ See Frankfurter, *supra*, note 21.

³⁷ Other jurisdictions have relied less on the Bar's sense of professional responsibility to ensure that the system's needs are met, and have implemented statutory regimes regulating the conduct of a case by counsel. For example in the United States, the federal *Speedy Trial Act of 1974*, 18 U.S.C. chapter 208, provides, at s. 3162(b), entitled "Sanctions" that the wilful failure of counsel for either the prosecution or the defence to proceed to trial "without justification as consistent with section 3161 of this chapter" may result in a reduction of defence counsel's fee by up to 25 per cent, a fine of up to 25 per cent of the fee which defence counsel would be entitled to charge on a private retainer, for a prosecutor a fine of up to \$250.00, and for either prosecution or defence counsel, denial of the right to practice before the court in question for up to 90 days, or the filing of a report with the appropriate disciplinary committee.

Like counsel, the police are also under the highest of duties to discharge their function in the criminal justice system responsibly.³⁸ Again, like counsel, this sense of responsibility is well developed, and readily understood. The need for the criminal investigators to act responsibly flows from three basic facts. The first basic fact, already stated above, is that there is a tremendously important societal need to apprehend and convict perpetrators of criminal acts, that is, the *actual* perpetrators of criminal acts. Thus, the first responsibility of the criminal investigator is to pursue his or her investigative duties skilfully and diligently, yet with the scrupulous dispassion that permits the evidence to tell its own story. The codes of conduct³⁹ to which the police are subject speak directly to this need to be diligent, impartial, honourable, and incorruptible.

The second and third basic facts that, in the Committee's view, most directly inform an understanding of the criminal investigator's responsibility, are that the investigator may exercise many broad powers, and that in many circumstances the investigator may exercise these powers at his or her discretion. The Committee sees it as self-evident that anyone who may, in certain circumstances (e.g. where obtaining a warrant is not feasible), decide, without prior authorization, to enter a private dwelling house, to arrest, charge, or incarcerate, must exercise those powers with the utmost responsibility.

The police, as public officials performing a variety of important tasks in the community, have a great many responsibilities placed upon them by a variety of rules, regulations, statutes, and, indeed, by public expectations. For example, when investigating

³⁸ Many very important police functions have little to do with the administration of criminal justice. Among these functions are crime prevention, traffic control, assisting those in need, and public education. Therefore, the notion of professional responsibility developed in this discussion relates primarily to the criminal investigator.

³⁹ See, for example, the *Police Services Act*, R.S.O. 1990, c. P.15, ss. 56, 135(1) and the Schedule to O. Reg. 791, "Code of Offences" under the *Police Services Act*, R.R.O. 1980; the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, ss. 37, 38 and *Royal Canadian Mounted Police Regulations*, 1988, Part II, "Discipline", *Can. Gazette*, Part II, Vol. 122, No. 15, p. 3181 at 3191.

a crime, the police are usually the first persons to have contact with the members of the public affected. It is, therefore, of the utmost importance that they conduct their investigations accurately, and with sensitivity. The police are also accountable to the public in many ways that are beyond the Committee's mandate, for example, through the Police Complaints Commission, and police services boards. However, two important sources of the general duty upon the police to discharge their functions responsibly are statutory codes of conduct, and the decisions of the courts. Codes of conduct are applied through disciplinary proceedings internal to the police community, while the decisions of the courts, often in the context of sections 7 to 10 of the *Charter*, are an external source of guidance, indirectly constraining particular exercises of power when the consequences are inconsistent with someone's legal rights. Case law that prescribes the realm of responsible conduct on the part of the police is legion. It is essentially the jurisprudence of sections 7 through 10 of the *Charter*. The extent of the case law on this aspect of police responsibility bespeaks, in the Committee's view, the great importance of an unfailing respect by the police for the legal rights of all persons, as those rights are contained in the *Charter*. This respect for legal rights, then, along with scrupulous and scrupulously impartial investigation of crimes, are the two pillars of a criminal investigator's responsibilities.

The Committee recognizes that the two pillars of a criminal investigator's responsibilities will inevitably force upon the investigator some difficult decisions. In many circumstances, it will be difficult to reconcile the responsibility to respect the legal rights of individuals with the effective detection of crime. The Committee, therefore, thinks it essential that, like Crown counsel, criminal investigators possess sound judgment in abundance. The Committee likewise thinks it important that, whenever difficult decisions arise, investigators seek the advice of more senior and experienced officers, or Crown counsel, where practical.

At the early stages of the criminal trial process, after a charge has been laid, the police officer involved in the prosecution will, typically, have already fulfilled most of his or her responsibilities as an investigator. The crime will have been carefully and impartially investigated, employing only those techniques that respect the legal rights of persons encountered in the course of the investigation. However, the responsibility to respect an accused person's legal rights does not end when the Crown assumes carriage of the prosecution. At least since the Supreme Court of Canada's decision in the *Stinchcombe* case, the police officer's responsibility to respect the constitutional rights of the accused person has encompassed the duty to provide the Crown with the information necessary for the Crown to make full disclosure.

As a matter of law, police officers exercise their discretion in conducting investigations and laying charges entirely independently of Crown counsel.⁴⁰ The police seek the advice of the Crown only where they think it appropriate. And while it is no doubt prudent to do so in many cases, the police are not bound to follow the advice of Crown counsel, as that advice relates to the conduct of the investigation and the laying of charges. The Crown likewise exercises independent discretion in the conduct of the prosecution before the courts, having no obligation to prosecute simply because a charge is laid by the

⁴⁰ Police officers in Ontario maintain the status of a constable at common law, from which their independence derives. This independence is not simply independence from Crown counsel, but is plenary, in that police officers are to make investigative and charging decisions based solely on the circumstances of the case, without regard to any extraneous influences. See the *Police Services Act*, R.S.O. 1990, c. P-15, s. 42(3); *Attorney General for New South Wales v. Perpetual Trustee Co. (Ltd.)*, [1955] A.C. 457 at 489-490 (P.C.); *Re a Reference under the Constitutional Questions Act*, [1957] O.R. 28 (C.A.); *R. v. Commissioner of Police ex parte Blackburn*, [1968] 2 Q.B. 119 (C.A.); *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association* (1975), 8 O.R. (2d) 65 (C.A.); *Nicholson v. Haldimand Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311 at 321, per Laskin C.J.C.; T.M. Brucker, "Disclosure and the Role of the Police in the Criminal Justice System" (1992), 35 *Crim. L.Q.* 57; Prof. J.L.I.J. Edwards, *The Attorney General, Politics and the Public Interest* (1984), at pp. 37-39, 405. See also p. 80 where Professor Edwards notes that "objection to the integration of both investigating and prosecution roles in the same body of officials has been voiced over a long period of our political history."

police.⁴¹ The mutual independence of the Crown and the police is recognized, for example, in the fact that different ministers of the Crown are responsible for each: the Attorney General, as the chief law officer of the Crown, and the Solicitor General, as the Minister responsible for providing police services.⁴² As stated in the House of Commons by the first Solicitor General of Canada:

It seems to me that to vest the authority for the investigative functions of the government in the same person who is going to conduct the criminal process is foreign to the spirit of justice.⁴³

This relationship of independence between Crown counsel and the police appears to differ from the relationship between investigators in the United States, and a District or U.S. Attorney. While the practice varies among the various states and the federal government, it appears that American prosecutors may be, generally speaking, actively involved in charging decisions,⁴⁴ and in the conduct of the investigation.⁴⁵

⁴¹ *Campbell v. Attorney General of Ontario* (1987), 31 C.C.C. (3d) 289 (Ont. H.C.); aff'd 35 C.C.C. (3d) 480 (Ont. C.A.); leave to appeal to S.C.C. refused, 35 C.C.C. (3d) 480n; J.L.J. Edwards, *The Law Officers of the Crown* (1964), at pp. 199-225; P.C. Stenning, *Appearing for the Crown* (1986), at p. 294. Crown counsel's important status, as an officer of the court and an impartial minister of justice, necessitates Crown counsel's independence from the police to preserve the independence of the court itself. Like that of the police, Crown counsel's independence is plenary, in that prosecutorial decisions are made solely in the public interest on the circumstances of the case, and without regard to inappropriate influence from any quarter.

⁴² In England, the police are under the auspices of the Home Secretary, whereas prosecutions are under the auspices of the Attorney General. Canada created a separate Solicitor General and Attorney General in 1966. Ontario was the first province in Canada to follow the lead of the Federal Government with the *Government Reorganization Act*, S.O. 1972, c. 1, s. 97. See, generally, the *Marshall Commission*, Vol. V, at pp. 1-27.

⁴³ H.C. Debates, Vol V., at p. 5524, May 25, 1966.

⁴⁴ *McDonald v. Goldstein*, 83 N.Y.S. 2d 620, 622 (1948); aff'd 79 N.Y.S. 2d 690; *Pugach v. Klein*, 193 F. Supp. 630, 634-635 (1961); *People ex rel. Daley v. Moran*, 445 N.E. 2d 270, 272 (Ill. S. Ct. 1983); *Manning v. Municipal Court of Roxbury Dist.*, 361 N.E. 2d 1274, 1276-77 (Mass. Sup. Jdcl. Ct. 1977); *The American Bar Association Standards for Criminal Justice* (3rd ed. 1992) Standard 3-3.4, "Decision to Charge," part (a) states that "the decision to institute criminal proceedings should be initially and primarily the responsibility of the prosecutor."

The mutual independence of Crown counsel and the police has many advantages. As will be discussed in greater detail below, separating the investigative and prosecutorial powers of the state is an important safeguard against the misuse of both. Such separation of power, by inserting a level of independent review between the investigation and any prosecution that may ensue, also helps to ensure that both investigations and prosecutions are conducted more thoroughly, and thus more fairly.⁴⁶ The police and Crown counsel can focus on their particular areas of expertise. As stated by the English *Royal Commission on Criminal Procedure* (1981) at pp. 146-149:

The police will retain unimpaired their law enforcement role and the primary responsibility for bringing detected offenders before the courts.... Thus the police will be required to sustain their standards of training and performance in all aspects of their investigative work, including case preparation. The prosecutor will have an independent role in the later stages of the process and an enhanced role because of that. His experience of the courts' view of cases ... and his role and status in the system will add weight to his advice to the police

However, the independence of Crown counsel and the police also places upon the police some important responsibilities. Most importantly, the Crown is entitled to rely on the police, as the investigative source of most of the information relevant to the guilt or innocence of an accused person, to bring forward accurately and completely whatever has a bearing on the case.

⁴⁵ For example, in the United States the grand jury is a powerful investigative tool employed by both United States Attorneys, and state District Attorneys. See LaFave and Israel, *Criminal Procedure* (1984, as updated), Chapter 8, ss. 8.1, 8.3; The National District Attorney's Association, *National Prosecution Standards*, 2nd ed., 1991, states that prosecutors have an "affirmative duty" to investigate crimes: s. 39, "Investigations," s. 41 "Subpoena Power and Grants of Immunity" and commentaries thereon. Therefore, United States Attorneys or District Attorneys will typically have their own investigative staff, answerable directly to them: *National Prosecution Standards*, *supra*, s. 8.3, "Investigators," and commentary thereon. The *American Bar Association Standards for Criminal Justice* (3rd ed. 1992), Ch. 3, "The Prosecution Function," Standard 3-3.1, "Investigative Function of Prosecutor" states in part (a) that, "a prosecutor has an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies."

⁴⁶ See generally, the *Marshall Commission*, Vol. I, at pp. 223-235.

There is one further reason why, in the Committee's view, integrity and responsibility on the part of the police, the Crown, and defence counsel are absolutely essential to the administration of justice in Ontario, and to the successful implementation of the Committee's recommendations. During the course of the Committee's oral hearings, the point was repeatedly made that Crown counsel need to be accorded generous latitude by the Attorney General to exercise their discretion in the circumstances of each individual case. The submissions to the Committee, from Crown and defence counsel alike, were virtually unanimous that Crown counsel conducting any given case ought not to be constrained by binding directives applicable across the province.

As will become apparent in its recommendation, the Committee accepts the submission that directives binding the discretion of Crown counsel in the conduct of a case should be few and far between. In the Committee's view, it is important to preserve a prosecutor's independent discretion for two reasons. First, in the Committee's view, comprehensive prosecutorial discretion is necessary to appropriately respond to the infinite variety of circumstances that may lead to an allegation of criminal wrongdoing. For example, in any class of cases in which a charge of break and enter is laid, the needs of the community, the victim, the witnesses, and the accused may vary so greatly that the charge laid is the only feature common to those cases. Only a broad discretion as to how those cases are to be prosecuted or resolved will adequately address such important and extensive differences. Second, comprehensive prosecutorial discretion is, in the Committee's view, necessary to preserve and perpetuate sensitivity in the administration of criminal justice to unique local conditions, local practices, and local needs. The administration of justice by Crown Attorneys is now, and has been since the earliest days of this province,⁴⁷ decentralized to the county or district level, consciously structured to accord due

⁴⁷ The *Upper Canada County Crown Attorneys' Act*, 1857, 20 Vic., c. 59; P. C. Stenning, *Appearing for the Crown* (1986), at pp. 114-121; *Crown Attorney's Act*, R.S.O. 1990, c. C.49, ss. 1-3; K. Chasse, F. Armstrong, "The Attorney General and the Traditional Crown Prosecutor - An Alternative View of Prosecutorial Powers" (1984), 2 *Crown's Newsletter* 1.

consideration to the particular needs of localities large and small. The Committee is of the view that this tradition is sound, has served the various localities throughout the province well, and should be preserved.

While the Committee is of the view that Crown Attorneys, acting locally, ought not to have their discretion unduly fettered by binding directives applicable across the province, such a recommendation is made only on the assumption that Crown counsel, the police, and defence counsel will at all times conduct themselves responsibly and with integrity in the relative autonomy of local conditions. The grant of any discretionary power always gives rise to the possibility that it may be misused. And the greater the discretionary power, the more serious are the consequences of its misuse. Accordingly, the Committee wishes to emphasize that the discretionary latitude it is recommending at the local level places a heavy premium on responsibility and integrity.

2. The Need for Sound Organization and Management

Apart from the vitally important roles and responsibilities of the professional participants in the early stages of the criminal process, the second principal theme animating the Committee's recommendations throughout is the need for sound organization and management of the criminal litigation process. The Committee has been informed by the General Division judges during the course of its consultations that, save for exceptional cases, General Division trials can be held in Toronto within three months of committal, and outside Toronto within six months of committal. The judges of the Provincial Division informed the Committee that in downtown Toronto trials can, generally speaking, be held within one to four months, and outside Toronto trials can be held within six to eight months. It appears, therefore, that, for the most part, all courts across the province are operating within the administrative guidelines discussed by the Supreme Court of Canada in *R. v. Morin*, [1992] 1 S.C.R. 771. However, this is no reason for complacency. Delay in the courts must be kept to a reasonable minimum, and thus the justice system must at all times be well organized and well managed.

To say that the administration of criminal justice, in its early stages, must be sound in organization and management, is merely to state the obvious. It is well documented,⁴⁸ and readily apparent to even the most casual observer, that the criminal justice system in Ontario is vast and complex, and, therefore, potentially unwieldy. It is, however, important, in the Committee's view, to identify certain general features of the justice system that account for its potential unwieldiness, in order to discover the principles that should govern our efforts to ensure that the system is both fair, and efficiently run.

Managing any organization is, perhaps, easiest if all personnel involved in the organization are engaged in co-operative or complementary tasks, and are accountable to one overseer with unconstrained managerial authority and a clear vision of what the organization is to accomplish. By comparison with such a best-case scenario, the criminal justice system poses significant management challenges. First, the major participants in the criminal justice system, namely, the police, the Crown, the defence Bar, the judiciary, and the government that funds the system, are all independent of each other. No one of these groups can tell the others how to perform their jobs. Quite the opposite. This sort of resolute independence is a cornerstone of fairness, the first principle in any justice system. However, from a management perspective, a vast and complex system is being run with no one overseer at the helm.

Second, all of the major participants in the administration of justice are not only independent, but have significant abilities, indeed, responsibilities, to draw on the resources allocated by the government to the administration of justice in the execution of their duties. The police must exercise their discretion to investigate and lay charges with respect to allegations of criminal wrongdoing having regard to the public interest. Crown counsel makes decisions as to the conduct of trials in which the public interest in achieving justice is the dominant factor. Defence counsel, acting responsibly as an officer of the Court,

⁴⁸ The Zuber Report, *supra*, at p. 4; the Joint Committee on Court Reform Report on Ontario Court Administration (1992).

conducts the defence as he or she sees fit, as a matter of the constitutional right of the accused being represented. And, of course, a trial judge runs his or her court room in a manner that is, first and foremost, fair. All of the decisions involved may have significant consequences for the overall cost of administering the criminal justice system. Thus, the administration of criminal justice is one of those rare situations where those who actually make the decisions that result in expenditures, are officially unaccountable to government, who must pay the bill.

Third, our system of criminal justice is essentially adversarial. This means that the major participants in the system are often not working co-operatively, in a managerial sense, but, rather, are working at cross-purposes to each other. During a criminal trial, Crown counsel requires the resources necessary to keep a courtroom in operation while he or she meticulously builds a case against an accused. However, at the same time, in cross-examination, and thereafter during the defence case in-chief, defence counsel requires similar resources to, perhaps, just as meticulously destroy the case the Crown has built. Obviously, then, adversarialism has a significant impact on the cost of administering justice. Few would doubt its important contribution to fair outcomes, and thus the adversarial system remains a cornerstone of our justice system. But it does not remain so without cost.

Fourth, the administration of criminal justice is not characterized by the pursuit of a single goal that can be stated in concrete terms. By way of contrast, a private corporation may exist for the maximization of profit. A non-profit, charitable organization may exist to assist children in need in a particular community. Objectives such as these are easily stated, and it is relatively apparent when they have or have not been obtained. In contrast, the aims of the justice system are not so easily stated, nor so easily recognized when they are obtained. Naturally, the justice system seeks to administer justice, but this is not a single idea, like maximizing profit, or helping hungry children. Rather, obtaining justice is a question of reaching a satisfactory result in the unique circumstances of each individual case. Yet cases vary infinitely, one from another. What is just in one case may be manifestly unjust in the next case. Therefore, in contrast to private business organizations, or local

charities, it is inappropriate to think of managing the justice system through the use of quotas, or targets, or through applying fixed formulas to the daily tasks at hand.

In sum, the Committee sees the principal challenges to the efficient yet fair management of the criminal trial process as arising from the combination of the independence of the major participants, their ability to draw on the system's resources without direct accountability, the inherently adversarial nature of the process, and the fact-specific nature of just outcomes. It must be emphasized that, in the Committee's view, all of the foregoing features of the criminal justice system are deeply necessary. Yet it is equally true that all of these features are, both individually and collectively, impediments to the efficient management of the criminal trial process. Therefore, in the Committee's view, the management challenge for the criminal trial process is to discern how to achieve efficiency without sacrificing the basic principles of the justice system.

How, then, is this challenge to be met? How can the criminal trial process be both fair, and effectively and efficiently managed? Obviously, the Committee's recommendations have been formulated with both justice and, to a lesser extent, efficiency in mind. However, in addition, there are, in the Committee's view, five general principles that can best guide the search to accommodate efficiency and the competing values discussed above when implementing the Committee's recommendations. It is hoped that the discussion of these five general principles that follows will assist the various jurisdictions across the province in achieving the objectives contemplated by the Committee's recommendations, while remaining duly sensitive to prevailing local conditions and sound local practices.

The first and, in the Committee's view, most important principle is that of full co-operation and involvement among all of the parties involved in the administration of justice in the search for fair yet efficient procedures. Since the police, the Crown, the defence Bar, and the judiciary are all independent of each other, the full participation of any of these parties in attempts to devise procedures to make the criminal justice system more workable, yet still fair, is strictly a matter of co-operation. New procedures cannot be imposed on any

one of these groups, but must be designed and implemented in a fully consultative way. Full co-operation from all of these parties also remains essential when any new methods of proceeding are up and running. There are co-operative dependencies among the police, Crown counsel, defence counsel, and the judiciary in virtually every aspect of the criminal justice system's practical day-to-day functioning. In effect, each of these parties independently possesses the power to nullify the system's continued viability. Therefore, the continued commitment and active co-operation of each of these groups, none of whom can be controlled by any of the others, is essential. Such co-operation and commitment must be maintained through clear and on-going communication and consultation among the police, bar and bench wherever necessary. As stated recently by Barbara Mills, Q.C., the Director of Public Prosecutions in England,

Each part of the system must retain its own identity and independence, but must recognise that the parts are also interdependent. Isolation of any one part will risk damage to the smooth operation of the whole of the system.⁴⁹

The second general principle that, in the Committee's view, must be present, if the competing demands of justice and efficiency are to be satisfactorily reconciled, is willingness on the part of all of the co-operative participants to change, to some extent, the ways in which they have traditionally carried out their respective functions. The Committee's recommendations have, as will be seen, implications for the way in which all participants in the criminal trial process discharge their responsibilities. The police and Crown counsel will have to adapt to early and full disclosure, and will be obliged to spend more time preparing for, and engaging in, early resolution, rather than merely preparing for trial. Likewise, defence counsel will have to adjust to spending much more time with a client's file in the early stages. The judiciary can aid the processes of early resolution greatly through the mechanism of the pre-hearing conference. There is also a need for communication between the Provincial and General Divisions in any given jurisdiction, so that counsel can meet their

⁴⁹ *Crown Prosecution Service Annual Report 1991-92*, at p. 8.

obligations in both courts with a minimum of conflict in scheduling. Finally, if full disclosure and early resolution is conscientiously pursued, the judiciary will see early pleas and joint submissions becoming increasingly common.

The participants in the criminal justice system must, however, be willing to change more than simply the concrete way in which they conduct their roles as police officers, Crown counsel, defence counsel, or judges. The participants must also be willing to approach the administration of justice from a unique perspective that preserves the fundamental need for fairness, while at the same time meeting the great need for efficiency. Simply put, they must be willing to take initiatives to properly and fairly resolve cases early. In doing so, the participants must place less emphasis on adversarialism and more emphasis on co-operative case management.

Police forces, for example, must be prepared to spend greater time and resources overseeing cases after the initial investigation is complete: anticipating and avoiding investigative problems that might hamper the prosecution before they arise, rather than waiting for the Crown counsel's direction, and doing only what the Crown insists is necessary, often when a particular problem is already well out of hand.

Likewise, Crown counsel must take early initiatives in managing their cases. For example, Crown counsel must discuss anticipated problems in a prosecution and proposed solutions with the police where necessary. Crown counsel must devote time to ensuring that the defence has full disclosure as early as possible, so that meaningful resolution discussions can likewise occur early. Crown counsel must familiarize himself or herself with the prosecutions at hand early on, and take a realistic view of both the strengths and weaknesses of a case. He or she must not hide behind an adversarial posture, but rather must participate co-operatively in meaningful resolution discussions. Further, Crown counsel must take reasonable positions on issues to be resolved, according the accused as much benefit for early resolution as the law and the circumstances of the case will permit.

Defence counsel must also devote time and effort to an accused's case very early in the process: diligently acquiring disclosure, and carefully reviewing it right away. Like Crown counsel, defence counsel must realistically assess the case against the accused, looking closely for gaps in the evidence or possible defences, while acknowledging the actual strengths of the Crown's case, and, where appropriate, engaging in reasonable resolution discussions. Conducting a case in this way does not mean sacrificing the interests of the accused. Quite the contrary. It means being vigilant at the early stages of a case to ensure that, if the accused's best interests lie in an early resolution, those interests are fully served.

The judiciary, too, may take initiatives early in the trial process, for example, assisting in appropriate ways to encourage early disclosure and resolution discussions between counsel. A judge may participate, within the limits of appropriate judicial conduct, in resolution discussions to assist in narrowing issues. He or she may also facilitate the early final disposition of cases by being available to preside over pre-hearing conferences and take pleas, and by giving joint submissions sufficient weight so as to ensure, without sacrificing the interests of justice in any particular case, that early co-operative resolutions are encouraged.

The fourth general principle that is, in the Committee's view, necessary to achieve efficiency without sacrificing fairness, is comprehensiveness. Charge screening, disclosure, and resolution discussions are, in the Committee's view, all closely interrelated. In the Committee's view, it is essential that any reform of pre-trial out-of-court practices recognize this fact.

For example, effective charge screening facilitates resolution by weeding out unnecessary charges. It also streamlines disclosure. Full and early disclosure in turn permits more wide-ranging and informed resolution discussions. Early and regular resolution discussions also assist in streamlining ongoing disclosure requirements. On the other hand, without charge screening, any disclosure system would necessarily have to cope with greater volume. Without charge screening, there would likewise need to be a greater

number of resolution discussions, which would also tend to be lengthier. And, full disclosure without any subsequent commitment by Crown and defence counsel to review the material early, and meet early to narrow issues, would do little to improve the efficiency and fairness of the criminal justice system. Therefore, the three activities of screening, disclosure, and resolution discussions must be seen by all participants as component parts of a necessarily integrated method of managing cases prior to trial.

The fifth and final key to successful case management in the criminal trial process must be, in the Committee's view, a willingness to commit resources to it at the outset. The Committee's recommendations with respect to charge screening, disclosure, and resolution discussions will inevitably require an increase in resources by the police and the Crown. In a slightly different way, defence counsel will likewise be required by the Committee's recommendations to apply their own resources up front. File review and preparation, which hitherto may have been done only on the eve of a trial date, set, perhaps, some months before, will have to be done much earlier, to permit meaningful early resolution discussions. On the occasions where early resolution discussions are not fruitful, this may mean additional work on the part of both Crown and defence counsel in preparation for trial.

The initial increase in resources and effort required by the Committee's recommendations will be somewhat speculative, because the recommended procedures must be put in place before any benefits will accrue. But without an initial commitment of resources, the considerable benefits to the efficient administration of justice, which the Committee is optimistic its recommendations entail, will not be realized.

Maintaining the co-operation necessary to the successful operation of recommendations such as the Committee has put forward requires open and ongoing communication among the police, the Crown, the defence Bar, and the judiciary.⁵⁰ But,

⁵⁰ The Committee observes that in England a formal body, the Criminal Justice Consultative Council, has been established recently to facilitate such communication. See the *Crown Prosecution Service Annual Report 1991-92*, at p. 8.

no less important to maintaining that co-operation are the benefits that the recommendations can afford to each of the participant groups: benefits which, from everyone's perspective, more than offset the costs. First and foremost is the goal of resolving cases in a fundamentally just manner. But, in addition to being fair, the Committee is hopeful that its recommendations will contribute to making the criminal trial process more efficient. The increase in early resolution of cases contemplated by the Committee's recommendations means that the police can save considerable amounts in police witness costs, thereby putting more officers back into the community. It is hoped that early resolution will free Crown counsel to perform other duties. And, of course, it is expected that the accused will benefit from early and just resolution. It is these potentially significant benefits that can, in the Committee's view, more than offset the costs and inconvenience that may be entailed in putting the recommendations which follow into practice.

Finally, it is, in the Committee's view, important to reiterate that the five principles guiding the management of the criminal trial process outlined above should be put into effect at a local level.

